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Supreme Court U.S.
FILED

(1)

No. 08-250

AUG 25 2008

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In the

Supreme Court of the United States

CHARLES and CATHERINE BRAUN, husband and wife, and EDWARD and MURIEL PARDON, husband and wife,

Petitioners,

v.

ANN ARBOR CHARTER TOWNSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* insofar as it requires property owners to seek compensation in state court to ripen a federal takings claim, where four justices of this Court declared in *San Remo Hotel v. City and County of San Francisco* that such a rule is "mistaken" due to its lack of doctrinal underpinning and preclusive effect on federal jurisdiction?

2. Is a property owner barred from bringing a procedural due process claim against a defective land use hearing simply because the owner also raised a regulatory takings claim subject to *Williamson County*, as the Sixth Circuit has held, or does the procedural due process claim supply an independent basis for constitutional relief, as the Ninth and Fifth Circuits have held?

3. Can a property owner raise a procedural due process challenge to a land use permit decision based on a fee simple interest in the affected land, as the Ninth and Seventh Circuits have held, or must the owner have an "entitlement" to the desired permit, as the Sixth Circuit held?

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PETITION FOR WRIT OF CERTIORARI

Charles and Catherine Braun and Edward and Muriel Pardon respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported at 519 F.3d 564 (6th Cir. 2008); it appears as Appendix (App.) A to the petition. The decision of the Federal District Court for the Eastern District of Michigan is not reported; it appears as Appendix B. The Sixth Circuit denied rehearing and rehearing en banc in an unpublished order; it appears as Appendix C.

JURISDICTION

The Sixth Circuit Court of Appeals denied rehearing on June 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall

any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case challenges the doctrine, arising from *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), that a private property owner must unsuccessfully pursue just compensation in state court in order to ripen a Fifth Amendment takings claim and, potentially, other constitutional claims. In the decades since *Williamson County*, the justifications for demanding a state court denial of compensation for ripeness have wilted. *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 350-52 (2005) (Rehnquist, C.J., concurring). Moreover, the "go to state court first" rule has proven to be incompatible with traditional rules of justiciability—such as res judicata and the *Rooker-Feldman* doctrine—which generally bar federal review of claims previously rejected by state courts. The state court litigation ripeness predicate also undermines the government's statutory right to remove a federal takings claim. As a whole, *Williamson County* effectively banishes federal takings plaintiffs and defendants from federal courts, without any indication this was intended, and without any coherent doctrinal justification. For all these reasons, lower courts and commentators have expressed deep frustration with *Williamson County*. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007); *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th

Cir. 1992); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO Sup. Ct. Rev. 39 (Mark K. Moller ed. 2005); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997).

Recognizing the dysfunction caused by *Williamson County*, the late Chief Justice William Rehnquist and three other Justices of this Court declared in *San Remo Hotel* that "[i]n an appropriate case" this Court should "reconsider" the rule that federal takings claimants "must first seek compensation in state courts." *Id.* at 352 (Rehnquist, C.J., concurring).

This is that "appropriate case." Here, two couples of elderly property owners (Property Owners) sought a zoning change necessary to make economically beneficial use of their land. Although they had historically farmed the land under the current agricultural zoning, this became economically infeasible. The Property Owners therefore sought a medium density residential classification, consistent with the zoning applicable to other adjacent, developed properties. But the Township denied the request. After the Township made clear that there was no available administrative relief, the Property Owners sued in federal court on constitutional grounds, including under takings and procedural due process provisions. The takings claim seeks just compensation for the adverse impact of the decision on their property use; the procedural due

process claim is based on bias and irregularities in the zoning hearings.

In the Sixth Circuit, the Property Owners asked the court not to follow *Williamson County*'s state litigation ripeness rule, based on the *San Remo* concurrence and other evidence of *Williamson County*'s infirmity. App. at A-7, 8. But the lower court refused. Indeed, it not only applied the state litigation ripeness rule to bar the Property Owners' regulatory takings claim, but additionally held, in conflict with other circuits, that the unripe takings claim subsumed and precluded the procedural due process claim challenging a defective hearing. *Id.* at A-13. Alternatively, the lower court held, again in conflict with other circuits, that the Property Owners' landownership was not a property interest that supported a due process challenge to the hearings that resulted in denial of their rezoning application. *Id.* at A-13, 14.

The Property Owners now petition this Court to settle the issue of whether *Williamson County*'s state compensation ripeness predicate remains good law and, if so, whether it can be extended to a basic procedural due process claim through the back door by subsuming such a claim in an unripe takings claim. If *Williamson County* does not go so far, the case presents the independently important issue of whether landownership is an interest sufficient to warrant procedural due process protections. The Court should grant the Petition in its entirety to resolve pervasive conflicts among the lower courts related to whether and when a property owner can challenge a land use permit process and final decision preventing the economically beneficial use of land on takings and due process grounds.

FACTS AND PROCEDURE BELOW

A. Facts

1. The Brauns and Pardons

Petitioners Charles and Catherine Braun (Brauns) are elderly fee simple owners of approximately 286 acres of land in Ann Arbor Township, Michigan. Appellants Edward and Muriel Pardon (Pardons) own approximately 77 acres of land adjacent to the Brauns' property. App. at A-3. The Brauns and Pardons will be referred to jointly as the "Property Owners."

As described by a longtime neighbor, the Brauns' ancestors "cleared the land in 1850. They built the roads," "provided the school system in this area," and constructed the Fire Department building. Petitioner Charles Braun began farming the land at issue here when he was 12 years old, after his father died. He farmed it as a family farm for decades after that. App. at B-2; Joint Appendix on Appeal 139:8-20. Today, Charles Braun requires the use of a wheelchair. Farming is not a physical possibility. Moreover, as shown below, it is no longer an economically viable way of life. The Pardons are also an elderly couple; they historically worked with the Brauns to farm their parcel and the Brauns' as one unit. *Id.* They ceased doing so when farming became unprofitable. App. at B-3.

2. The Property

The Brauns' and Pardons' parcels comprise approximately 363 acres of land. This area (the Property) is sandwiched between a residentially developed parcel on the south and a 2,000-acre mixed

use development on the north. It is predominately zoned as "A-1, General Agricultural District," a classification that allows agricultural uses and low density residential development on lots of 10 acres or more. App. at B-2. The Property has historically operated within the current zoning regime as a farm. *Id.* at B-2-3. Unfortunately, the Property Owners are and have been unable to support themselves from income generated from the farm. *Id.* at B-3 ("The Pardons lost money in 2005, and the Brauns earn[ed] an amount barely sufficient to cover their costs.").

Faced with troubling economic realities, the Property Owners began to pursue a zoning change that would allow an economically feasible residential use. Specifically, they considered rezoning 215 acres of the Property to an "R-6" mobile home classification that would allow affordable manufactured housing, and rezoning the remainder of the acreage in an "R-3" zone, so as to potentially allow higher density single family housing. App. at A-4.

During this period, a qualified agricultural economist surveyed the Property and confirmed "that it is not economically feasible to continue agricultural operation on the . . . property." App. at B-3. A real estate appraiser concluded that the current zoning does not provide an economically viable alternative to farming because it permits only 30 homes on the 363-acre parcel, a regime under which no prudent developer would attempt to build. *Id.*; App. at A-4.

3. The Administrative Process, Zoning Denial, and Lack of an Appeal Option

The Property Owners officially filed a Petition for Zoning Amendment (Petition) in February, 2001. App. at A-4. The Petition asked to change the zoning of the Property to the desired R-6 and R-3 classifications. *Id.* The application supplied all the information required for a zoning decision by the Township code. The Township accordingly gave notice that the Petition would be set for a public hearing. *Id.*; App. at B-3-4.

After an initial aborted hearing, the Township Planning Commission (Commission) held a substantive hearing on July 9, 2001. During this meeting, the Township demanded for the first time that the Property Owners submit detailed, and expensive, site specific development plans before a zoning decision would occur. App. at A-5 n.3. This information was not required by the Petition application form, nor compelled by the Township code, nor required of other types of zoning changes. *Id.* at A-4. The Property Owners became aware at this time that the Township had a history of resistance to affordable manufactured housing, having approved only one such project, and by court order. They subsequently informed the Township that, under the Township's own Zoning Ordinance, the requested site plans were not pertinent to, or required for, a general zoning amendment. *Id.* The Property Owners asked the Township to make a decision based on the information previously provided in conformance with the Zoning Ordinance.

The Commission then held a third and final public hearing, at which time it recommended that the Township Board deny the rezoning. *Id.* at A-5. Soon

after, the Board denied the Petition. *Id.* This action was primarily premised on speculation about the impact of a manufactured housing development, if approved, and concerns about the Owners' refusal to supply detailed site and subdivision plans not required for a zoning change. After the denial, the Township told the Property Owners that there was no available appeal because "the [Zoning Board of Appeals] does not have jurisdiction to 'change a [Zoning Classification] for any property, grant a use variance, or hear any other appeal from the Township Board.'" App. at A-5.

B. The State Court Action and Further Administrative Process

After being informed that the Township Code denied the Zoning Board discretion to hear an appeal, the Property Owners filed a suit in state court. App. at A-6. This suit alleged in part that the Township's zoning denial amounted to a regulatory taking under state law. On appeal, the state appellate court held that the Property Owners lacked a ripe suit until they went back to the Zoning Board and requested a use variance or received an explicit determination from the Board that it lacked jurisdiction. *Id; see Braun v. Ann Arbor Charter Twp.*, 683 N.W.2d 755, 758 (Mich. App. 2004). The Property Owners sought review in the Michigan Supreme Court, but were denied. App. at A-6.

The Owners then went back to the Township Zoning Board, as directed by the state court. After a public hearing, the Board of Appeals decided that the Township code gave it no authority to grant a variance from the zoning classification. *Id.* at A-6.

C. Federal Proceedings

1. The District Court

Soon after the last denial of administrative relief, the Property Owners filed suit against the Township in federal court. *Id.* The complaint raised a regulatory taking claim under the Fifth Amendment based on the severe economic harm caused by the zoning denial. It also asserted a procedural due process claim premised on a denial of a "full and fair hearing," arising from bias against low income manufactured housing and the Township's demand for information not required for a zoning change.

The Township moved for summary judgment on a single ground: that the Property Owners' claims were unripe for federal review. The district court agreed, holding that, under *Williamson County*, 473 U.S. at 194, the Property Owners needed to return to the state courts to receive a state law just compensation ruling on the merits before they could invoke federal review. App. at B-10-16.

2. The Sixth Circuit's Decision

On appeal, the Sixth Circuit rejected the Property Owners' arguments that their claims were ripe, and affirmed the district court decision in a published opinion issued March 13, 2008. Initially, the court declared that *Williamson County* remained controlling law: "The Supreme Court has yet to adopt the plaintiffs' position or to overrule *Williamson County* on other grounds; consequently, we reject the plaintiffs' argument that they are not bound by the requirement to pursue a remedy in state court." App. at A-11. The court ultimately held that "[b]ecause the plaintiffs did not fulfill their obligation of seeking [and being denied]

just compensation in state court, we do not have jurisdiction to reach the merits of their takings claim." *Id.* at A-13.

The court then concluded that the Property Owners' procedural due process claim "should be governed by the takings claim theory requiring exhaustion of state remedies" because "it is ancillary to and includes the same facts as the takings claim." *Id.* The procedural due process claim was thus dismissed pursuant to the takings ripeness doctrine. *Id.* at A-16.

For good measure, the Sixth Circuit held that, even if the procedural due process claim were considered ripe for federal review independent of the takings claim, it failed because "we are unable to find any cognizable property right that triggers due process protections." *Id.* at A-13-16. In reaching this holding, the court explained that "[i]n order to have a property interest in a benefit, a person must have more than a desire for it or unilateral expectation of it; rather, he must have a 'legitimate claim of entitlement to it.'" *Id.* at A-16. The court held it could find no protected interest of this sort and, therefore, that the Property Owners could not challenge the zoning process and adverse decision on procedural due process grounds. *Id.* at A-17.

The Property Owners asked for rehearing in part on the ground that they were not claiming the rezoning application as a protected property interest but rather relied on their fee simple landownership. Rehearing was denied. App. at C-2.

REASONS FOR GRANTING THE WRIT

I

THE CASE RAISES AN IMPORTANT ISSUE AS TO WHETHER *WILLIAMSON COUNTY*'S STATE LITIGATION REQUIREMENT SHOULD BE REPUDIATED DUE TO ITS OBVIOUS DOCTRINAL FLAWS AND CHAOTIC JURISDICTIONAL EFFECTS

In *Williamson County*, this Court considered whether a takings claim based on the economic effect of a land use regulation was ripe. 473 U.S. at 174. The Court initially ruled that the claimant lacked a ripe claim because there was no "final agency decision" on application of the suspect land use regulations. *Id.* at 188-90. Although this effectively decided the case, the *Williamson County* Court went on to articulate a second, more novel ripeness barrier. In particular, the Court ruled, for the first time, that a federal takings claim seeking compensation would not ripen until the claimant unsuccessfully sought and was denied just compensation through a state's compensation procedures. 473 U.S. at 194, 197. It is this requirement that is at issue here.

A. There Is No Doctrinal Basis for *Williamson County*'s State Court Ripeness Requirement

1. *Williamson County* Rests on a Flawed Understanding of the "Without Just Compensation" Portion of the Takings Clause

The *Williamson County* Court purported to derive the state litigation rule from the nature of the Takings Clause and, particularly, from the "without just compensation" portion. *Id.* at 194-95. *Williamson County* interpreted this language to mean that there is no actionable "violation" of the Takings Clause until the claimant is "without just compensation." From this premise, the Court then concluded that a claimant must be denied compensation in state court before seeking compensation for a Fifth Amendment taking in federal court. *Id.*

This reasoning is flawed from start to finish because it fails to account for the fact that the primary function of the Takings Clause, unlike other constitutional provisions, is to prescribe a posttaking damages remedy, rather than to place a limitation on government power. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 61 (1999). Under modern understandings of the Just Compensation Clause, a landowner subject to an invasion does not acquire a right to claim a constitutional "violation" based on a lack of compensation (as *Williamson County* assumed); instead, what he acquires is a cause of action for

damages.[1] *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) ("[E]ven if the defendants are acting illegally [by taking property without compensation proceedings] . . . the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law.").

As this Court has repeatedly explained in cases predating *Williamson County*, the Just Compensation Clause functions as a "self-executing" damages remedy. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933) (a property owner's right to sue for money damages "rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States."); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (citing 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972) (noting "'the self-executing character of the constitutional provision with respect to compensation.").

2. The "Self-Executing" Nature of the Federal Just Compensation Remedy Prohibits a "Go to State Court First" Rule

While the remedial aspect of the Just Compensation Clause means a property owner subject to an uncompensated taking has an action for damages, not for a constitutional "violation," the "self-executing" aspect means that remedy *is available as*

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[1] Equitable relief may be available in limited circumstances. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978).

soon as an alleged taking occurs. United States v. Dickinson, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose"); *Clarke*, 445 U.S. at 258 ("[T]he usual rule is that the time of the invasion constitutes the act of taking and '[i]t is that event which gives rise to the claim for compensation.' ") (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984) (a property "owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government."); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("[G]overnment action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

And since the self-executing just compensation remedy is a *federal* right, the federal courts have historically been a proper forum for its vindication. *Ballard Fish & Oyster Co. v. Glaser Constr. Co.*, 424 F.2d 473, 475 (4th Cir. 1970) (holding that a federal takings claim for compensation raised a "federal question" appropriate for federal judicial review without respect to state law remedies); *see generally Heritage Farms, Inc. v. Solebury Twp.*, 671 F.2d 743 (3d Cir. 1982); *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984); *Hill v. City of El Paso*, 437 F.2d 352 (5th Cir. 1971) (all federal takings cases heard on merits). As a whole, the historical understanding is that a property owner who claims an invasion of property is a taking, has a right, under the "self-executing" federal Just Compensation Clause, to immediately go to federal court for monetary relief.

Ballard 424 F.2d at 475; *First English*, 482 U.S. at 315 ("A landowner is entitled to bring an action [for damages] in inverse condemnation as a result of "'the self-executing character of the constitutional provision with respect to compensation.'"") (citing *Clarke*, 445 U.S. at 253, 257 (quoting P. Nichols, *Eminent Domain* § 25.4)).

Williamson County radically departed from this Court's Just Compensation Clause precedent in holding that a property owner subject to an alleged taking cannot seek the federal compensation remedy in federal court until state courts have their say. And it did so without any analysis of the damages remedy framework established in the prior century of case law. Moreover, as commentators have pointed out, there is no overriding textual justification that might justify abandoning, *sub silentio*, the understanding that the just compensation remedy is actionable at the moment of invasion. *See* Roberts, *supra*, at 72 ("The language of the Fifth Amendment does not dictate this [state procedures] rule."); Michael M. Berger and Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 694 (2004) ("There is nothing in . . . the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.").

Accordingly, there is no plausible doctrinal support for requiring takings claimants, like the Property Owners here, to litigate in state court before they claim the lost value of regulated land under the

Just Compensation Clause.[2] Instead, this Court's traditional jurisprudence indicates that the Property Owners acquired a federal cause of action for such monetary relief—founded on the Just Compensation Clause—at the time the property restrictions were finalized. The court below was asked to follow this understanding, rather than the *Williamson County* "state court first" anomaly, but it declined. Accordingly, this case presents a perfect vehicle for reconsidering *Williamson County*'s state litigation ripeness rule and, particularly, whether it was ever legitimate due to this Court's preexisting takings jurisprudence.

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[2] The *Williamson County* Court attempted to buttress its novel understanding of the timing for a claim under the Just Compensation Clause by analogizing to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981). But neither decision actually provides support. *San Remo*, 545 U.S. at 349 n.1 (Rehnquist, C.J., concurring). Unlike *Williamson County*, *Monsanto* did not involve a federal claim for just compensation; it involved a claim for equitable relief alone. *Monsanto*, 467 U.S. at 998. The *Monsanto* Court's holding that equitable relief was unavailable had nothing to do with the ripeness of a just compensation claim. *Parratt* held that a claimant challenging a random property deprivation for which predeprivation process was impossible must exhaust adequate postdeprivation state remedies. Post-*Williamson County* decisions have strictly limited *Parratt* to its random deprivation context. *Zinermon v. Burch*, 494 U.S. 113, 129-30 (1990). *Parratt* thus has no relevance to a taking, such as the one in *Williamson County*, occurring by formal decision after predeprivation process.

B. The State Compensation Requirement Wreaks Havoc on the Federal Jurisdictional Framework

Williamson County's state procedures ripeness requirement is unworkable in practice, as well as doctrinally unsound.

1. The State Compensation Ripeness Rule Conflicts with Preclusive Res Judicata Principles, So That a "Ripe" Claim Is a Precluded One

Although *Williamson County* indicates that failed state court litigation will "ripen" a federal takings claim for federal review, 473 U.S. at 194-96, this is not what happens in practice because of conflicting res judicata principles. *See generally Allen v. McCurry*, 449 U.S. 90, 94 (1980).

As one court explained:

> *Williamson* and its progeny place Plaintiffs in a precarious situation. Plaintiffs must seek redress from the State court before their federal taking claims ripen, and failure to do so will result in dismissal by the federal court. However, once having gone through the State court system, plaintiffs who then try to have their federal claims adjudicated in a federal forum face, in many cases, potential preclusion defenses. This appears to preclude completely litigants such as those in the case at bar from bringing federal taking claims in a federal forum . . . .

W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140,146 (E.D.N.Y. 2002).

As described by the Seventh Circuit:

> Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if . . . the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit. The failure to complain of the taking under federal as well as state law is a case of "splitting" a claim, thus barring by virtue of the doctrine of res judicata a subsequent suit under federal law.

Rockstead v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007).

This res judicata problem is particularly vexing to courts and litigants because *Williamson County* did not anticipate it, or account for its effect in banishing federal takings claims to state court. *DLX*, 381 F.3d at 521 ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions."). Faced with the disconnect between *Williamson County*'s ripeness intent, and its actual effect in triggering preclusion, some courts have tried to craft res judicata exceptions that would allow "ripened" takings claims in federal court. *See DLX*, 381 F.3d at 519-21 (describing method to reserve federal claims); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d at 1303-06 (same).

In 2005, this Court rejected court-created exceptions to res judicata in the takings context in the *San Remo* case. 545 U.S. at 338, 344-45. Yet, *San Remo* did *not* alter *Williamson County* or its instruction that unsuccessful state court compensation procedures will "ripen" federal review of takings claims. As a result, this Court's jurisprudence continues to offer takings litigants and federal courts two conflicting sets of rules. On the one hand, *Williamson County* says that unsuccessful pursuit of a just compensation claim in state court will render a federal takings claim "complete" and ready for federal review. 473 U.S. at 194-96. On the other hand, *San Remo* and other cases strictly construing the Full Faith and Credit Act declare that prosecution of claims in state court will entirely preclude subsequent federal review. 545 U.S. at 344-45. Not surprisingly, federal courts also continue to issue inherently contradictory precedent on the availability of jurisdiction over a federal takings claim. *Compare Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 569 (6th Cir. 2008) ("in order for a plaintiff to bring a takings claim in federal court, he or she must first pursue available remedies in state court"), *with Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287 (6th Cir. 2008) (because "the issue of just compensation under the Takings clause . . . was directly decided in a previous state court action, it cannot be re-litigated in federal district court").

Williamson County accordingly operates as a jurisdictional trap, rather than ripeness prerequisite, as it commands would-be federal takings plaintiffs to take state litigation steps that permanently bar federal

review.[3] This cannot have been by design. *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995) ("We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs . . . ."); Daniel Mandelker et al., *Federal Land Use Law* 4A-23 (1998) ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants.").

2. The State Procedures Requirement Eviscerates the Government's Ability To Remove a Federal Takings Claim

Williamson County's state litigation ripeness requirement is equally harmful to a government defendant's ability to invoke federal jurisdiction under the federal removal statute. A takings defendant must demonstrate federal jurisdiction in order to remove a claim, *see* 28 U.S.C. § 1441(b) (removal depends on "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the

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[3] A similar problem can occur through a conflict between *Williamson County* and the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine prevents federal courts from entertaining suits "complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 281 (2005). Some courts have held that compliance with *Williamson County* triggers *Rooker-Feldman* and prevents, rather than matures, federal review. *See, e.g., Johnson v. City of Shorewood*, 360 F.3d 810, 818-19 (8th Cir. 2004). Thus, "[t]he catch-22 of the '*Williamson* trap' discussed . . . with respect to res judicata is also evident with respect to the *Rooker-Feldman* doctrine." *DLX*, 381 F.3d at 518 n.3.

United States"), but *Williamson County* is typically understood to bar federal jurisdiction over takings claims until state court litigation ends. *Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992) ("If a claim is unripe, federal courts lack subject matter jurisdiction."). Consequently, due to the state litigation ripeness predicate, defendants logically cannot remove a federal takings claim from state court, though it has the appearance of a federal issue.

Many courts have indeed concluded that a plaintiff's lack of compliance with *Williamson County* bars a defendant's removal of a Fifth Amendment takings claim. *Moore v. Covington County Comm'n*, 2007 WL 1771384, at *3 (M.D. Ala. 2007) ("Because the defendants removed this case to federal court before the plaintiffs could pursue their claims in state court, this court lacks jurisdiction."); *Doney v. Pacific County*, 2007 WL 1381515, at *4 (W.D. Wash. 2007) ("[B]ecause Plaintiffs have not adjudicated an inverse condemnation claim in state court, the federal takings claim is not yet ripe and should accordingly be remanded to state court."); *Carrollton Properties, Ltd. v. City of Carrollton*, 2006 WL 2559535, at *2 (E.D. Tex. 2006) (denying removal because "[p]laintiffs have not unsuccessfully pursued just compensation in state court, thus the claim is not ripe, and it is not a federal question").

It is true that some federal courts have opted for permissive removal when confronted with the conflict between the federal question removal statute and *Williamson County*'s barrier. But this just creates yet another Kafkaesque jurisdictional nightmare, one where a takings plaintiff is dragged by a defendant into a federal forum closed to the plaintiff, forced to

litigate there (perhaps for years), only to be kicked back on appeal to the state court where it all started due to lack of *Williamson County* ripeness. *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 625-26 (5th Cir. 2003) (removal allowed, landowner wins on merits in trial court, but on appeal, Fifth Circuit remands case to state court where initially filed due to lack of compliance with *Williamson County*); *Reahard v. Lee County*, 30 F.3d 1412, 1418 (11th Cir. 1994) (remanding removed takings claim back to state court after five years of federal litigation, including on the merits and two circuit court appellate opinions, based on lack of state court compensation proceedings).

While *Williamson County* may have been conceived as a simple ripeness hurdle, it has metamorphosed into a monster that confuses courts and swallows the claims of takings litigants who comply with its predicates to secure federal review, but who then discover that the law is the opposite of what it seems. *San Remo*, 545 U.S. at 350-51 (Rehnquist, C.J., concurring). In the same way, government defendants are deprived of their statutory ability to remove constitutional takings claims to a federal forum. Furthermore, because the federal removal statute allows imposition of financial penalties against defendants who remove in the absence of jurisdiction, 28 U.S.C. § 1447(c), a defendant may not only be barred from removing due to *Williamson County*'s state litigation ripeness predicate, they may be subject to attorneys' fees for the attempt. *See, e.g., Quivira Village, LLC v. City of Lake Quivira*, 2004 WL 1701070, at *2 (D. Kan. 2004) (awarding fees for wrongful removal of takings claim because the

defendant "was on notice that the federal claims were not ripe").

All this jurisdictional chaos and inequity can be straightened out by a simple return to the doctrinally sound pre-*Williamson County* regime. Although precedent is not to be lightly overturned, when a rule–such as the state litigation predicate—is both mistaken and unworkable, this Court has not hesitated to abandon it. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) (" '[W]hen governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent."' ") (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

This Court should grant certiorari in this case to overrule *Williamson County*'s state litigation requirement.

II

THIS CASE PRESENTS AN IMPORTANT QUESTION, ON WHICH LOWER COURTS CONFLICT, AS TO WHETHER TRADITIONAL PROCEDURAL DUE PROCESS CLAIMS ARE SUBSUMED IN AND BARRED BY A TAKINGS CLAIM SUBJECT TO *WILLIAMSON COUNTY*

The Property Owners challenged the Township's actions under federal procedural due process protections, as well as the Takings Clause, alleging a biased and otherwise defective process. Yet, the Sixth Circuit held that this due process claim was subsumed in its takings analysis, in conflict with other federal

courts. App. at A-13-16. This decision has untenable consequences for federal jurisdiction over procedural due process claims.

A. Subsuming Procedural Due Process Claims in Takings Law Effectively Ends Federal Jurisdiction over Those Claims

At first glance, a decision to treat a land use procedural due process claim as a takings challenge might seem to do nothing more than change the focus of federal review. But when *Williamson County* is brought into the picture, it has a much more regressive impact. For if a due process claim is subsumed in a takings claim (which is itself subject to *Williamson County*), the due process claim also is subject to the "state court first" ripeness barrier as a practical matter. Despite *Williamson County*'s limitation of the state court predicate to takings, 473 U.S. at 196 (applying only the "final decision" prong to a due process claim), it reaches due process claims when they are ancillary to unripe takings claims. *See* App. at A-15-16.

But a doctrine subsuming due process claims in takings claims does not merely end with application of *Williamson County* to procedural due process claims. Due to the *Williamson County*/res judicata conflict, the ultimate effect is to totally prevent land use applicants from *ever* invoking due process in federal court. This is because the state court litigation needed to ripen a takings claim (and an ancillary due process claim) will trigger res judicata over both claims at the federal level. *See Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1322-23 (10th Cir. 1998); *Rainey Bros. Constr. Co., Inc. v. Memphis and Shelby*

County Bd. of Adjustment, 967 F. Supp. 998, 1004 (W.D. Tenn. 1997). It makes no difference if the would-be procedural due process claimant declines to actually litigate that claim in a predicate state court takings action, because claim preclusion bars federal review of claims that *could have been* raised in earlier litigation, as well as those that actually were. *Wilkinson*, 142 F.3d at 1322-23.

Thus, holding a procedural due process claim contingent on a takings claim starts a chain reaction that results in the unprecedented abdication of federal jurisdiction over an explicit federal constitutional provision: the procedural component of the Due Process Clause. There is no basis for this in the Court's jurisprudence. *See Soldal v. Cook County*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50 (1993) (the "question is not which Amendment controls but whether either Amendment is violated"); *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (right to procedural due process does not require collateral injury); *Zinermon*, 494 U.S. at 136-37 (no resort to adequate state remedies required for due process claims challenging a nonrandom decision in which pre-deprivation process was possible).

Because of its radical and unprecedented effect in banishing land use procedural due process claims from federal court, the lower court's decision to subsume a

procedural due process claim in takings analysis raises an important issue worthy of this Court's review.

B. Federal Courts of Appeals Are In Conflict on Whether Takings Claims Preempt Land Use Procedural Due Process Claims

There is a substantial disagreement among the lower courts on whether to subsume in takings analysis a procedural due process claim challenging an injury other than lack of just compensation.

1. The Ninth and Fifth Circuits View Procedural Due Process Claims as an Independent Basis for Federal Relief, In Conflict with the Decision Below

The Ninth Circuit has consistently rejected the idea, adopted below, that procedural due process claims targeting a traditional procedural injury are subsumed in takings claims, and thereby subject to *Williamson County*. *See Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003) (a procedural due process claim alleging a biased decision-making process is distinct from a takings claim and thus exempted from *Williamson County*); *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990) (holding that a "procedural due process claim [based on lack of notice] does not directly arise from, or rely on, his taking claim . . . [and] is not subject to the ripeness constraints applicable to regulatory takings"); *Weinberg v. Whatcom County*, 241 F.3d 746, 752 (9th Cir. 2001) ("A procedural due process claim, unlike . . . takings claims, is not rooted in the notions of adequate compensation and economic

restitution but is based on something more—an expectation that the system is fair and has provided an adequate forum for the aggrieved to air his grievance" and so redresses a distinct injury.); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989).[4]

As *Sinaloa* explained:

> [T]he rationale for requiring exhaustion of state compensation remedies in taking cases does not extend to a claim that plaintiffs were denied due process. . . . It is of no moment that this due process claim is based on factors that also form the basis of an alleged taking. Two or more legal theories may cover the same conduct and a plaintiff is entitled to prove each claim according to its terms. Accordingly, we reject the contention that *Williamson County* requires plaintiffs to seek relief in state court for the alleged violation of their right to due process.

Id. at 1404.

The Fifth Circuit also treats land use procedural due process claims as independent claims that are distinct from takings law. *See Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1045 n.6 (5th Cir. 1998) (refusing to treat a procedural due process claim based

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[4] *Sinaloa* was overruled on other grounds—particularly, on its conclusion that a *substantive* due process claim was viable—by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). But in 2007, *Armendariz itself was abrogated* on the very point under which it purported to overrule *Sinaloa*. *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007). *Sinaloa*'s understanding of substantive due process was thereby reaffirmed, and the case is logically good law in full.

on a contractual breach as within the reach of takings ripeness); *Bryan v. City of Madison*, 213 F.3d 267, 272, 275 n.16 (5th Cir. 2000) (dismissing takings claim for lack of state procedures ripeness, while reviewing a due process claim, based on hearing irregularities, on the merits).

The D.C. Circuit is in line with the Ninth and Fifth Circuits on the issue. *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460 (D.C. Cir. 1997) (declining to treat a due process claim as an adjunct of an unripe takings claim); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

2. The Seventh and Tenth Circuits Agree with the Sixth That Procedural Due Process Claims Are Subject to Takings Analysis

Other courts, such as the Seventh Circuit, hold that takings law controls land use procedural due process claims. In *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961-62 (7th Cir. 2004), for instance, the Seventh Circuit broadly held that procedural due process claims arising from zoning disputes are governed by takings ripeness rules. *See also Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000).

Similarly, "[t]he Tenth Circuit repeatedly has held that the [second] ripeness requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim" because it considers takings law as controlling. *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996); *Miller v. Campbell County*, 945 F.2d 348, 352-53 (10th Cir. 1991); *Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm'rs*,

972 F.2d 309, 311 (10th Cir. 1992); *J. B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309-10 (10th Cir. 1992).

The Sixth Circuit sided with the Seventh and Tenth Circuits on the issue of subsuming a procedural due process claim in a takings claim subject to *Williamson County*, and thereby solidified a persistent split between the circuits on the question. Because of this split, the scope of federal protection for due process in land use disputes is contingent on the particular jurisdiction. If a complaining land use applicant is unlucky enough to reside in the Sixth, Seventh, or Tenth Circuit, she cannot raise a traditional due process claim because it is subsumed in precluded takings claims. Conversely, if the plaintiff resides in the Ninth, Fifth, or D.C. Circuits, the same procedural due process claim will be held ripe and reviewed on the merits in the federal court.

The Court should grant the Petition to resolve the conflict.

III

THE DECISION BELOW RAISES AN IMPORTANT ISSUE, ON WHICH COURTS CONFLICT, OF WHETHER LANDOWNERSHIP INTERESTS ARE ADEQUATE TO TRIGGER PROCEDURAL DUE PROCESS RIGHTS IN THE LAND USE PERMITTING CONTEXT

The decision below held that even if the Property Owners' procedural due process claim was ripe, it failed because the Owners could not show an "entitlement" to the desired zoning, and therefore they had no protected property interest. App. at A-16-17.

The court rejected the argument that a fee simple title was a sufficient interest. This decision drastically limits the reach of procedural due process protection, and conflicts with the decisions of other courts.

A. The Denial of Protected Property Interests in Land Deprives Zoning Applicants of All Procedural Due Process Protection

The Sixth Circuit's conclusion that landownership is not enough to trigger the Due Process Clause has devastating consequences for the procedural rights of landowners. Going a step beyond denying federal judicial review (as the decision to subsume due process in takings law does), to rule that a zoning applicant has no protected interest is to totally eliminate resort to the Due Process Clause—in federal *or* state court. After all, if there is no property, there is simply no due process requirement. *James v. City of St. Petersburg*, 33 F.3d 1304, 1307 (11th Cir. 1994) (property owner's "failure to demonstrate that she had a constitutionally protected property interest in continued water service makes it unnecessary to determine whether the City afforded her procedural due process").

The government's duty to provide notice and a fair hearing is a fundamental aspect of constitutional governance. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). But, if a zoning applicant has no constitutionally protected property interest, as the Sixth Circuit held, the government can deny a requested use of land in closed session without notice or hearing, and the applicant has no resort to the Due Process Clause. Banishing land use applicants from the umbrella of procedural due process is a radical step, particularly

where, as here, the applicants typically hold a fee simple title replete with common law rights of free use.

The Sixth Circuit's decision that landownership does not warrant due process in land use permitting accordingly raises an important issue worthy of this Court's attention.

B. Courts Are In Conflict on Whether a Land Use Applicant Must Identify a Positive Government Entitlement, Rather Than Fee Simple Ownership, to Claim Procedural Protections

Federal courts disagree on whether landownership triggers due process protection.

1. The Origin of the Conflict

The conflict among the courts on whether a land use applicant must show an entitlement to a permit, rather than simply claiming a property interest in land, derives from this Court's expansion of procedural due process as a means of securing access to governmental benefits or "entitlements," and its retrenchment of the definition of those entitlements. *Compare Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970), *with Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972).

In *Goldberg*, this Court relied on two law review articles by Charles A. Reich, *see* Reich, *The New Property*, 73 Yale L.J. 733 (1964), and Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965), in holding that a welfare recipient had a property interest entitling him to a hearing before the termination of benefits. *Goldberg*, 397 U.S. at 263 n.8.

Two years later, this Court limited *Goldberg's* expansion of new due process property interests:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Roth, 408 U.S. at 577 (emphasis added).

The *Roth* Court concluded that the claimant had no entitlement to continued employment: "In these circumstances, the respondent . . . did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." *Id.* at 578. Thus, for "new property" rights, *i.e.*, those "rights that do not fall within traditional common-law concepts of property," this Court limited procedural due process to those interests that rise to a "legitimate claim of entitlement." *Goldberg*, 254 U.S. at 263 n.8. *Roth* did not, however, repudiate due process protection for "old" property rights, such as the right to use land inherent in fee simple title.

Unfortunately, some courts, including the Sixth Circuit, have extended *Roth*'s "entitlement" standard to the real property context. Others have declined.

2. Like the Court Below, the Second, Fourth, Eleventh, and Eighth Circuits Have Extended *Roth* to Land Use Claims

The Second Circuit is a leading proponent of a *Roth* "entitlement" prerequisite for due process protection. In *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989), that Circuit explained that a litigant must show no discretion in issuance of a permit, or that issuance is "virtually assured," to have a property interest triggering due process protections. In so doing, the *RRI* court recognized that courts historically assumed "that the pertinent property interest is the property the plaintiff owns." 870 F.2d at 916 (citations omitted). The *RRI* court itself was unsure why this wasn't still the test:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for—whether a zoning variance, a business license, or a building permit—instead of simply recognizing the owner's indisputable property interest in the land he owns . . . ."

870 F.2d at 917. Nevertheless, based on a prior Second Circuit case, the *RRI* court adopted the requirement that a landowner have a vested right to a permit before a permit application can be subjected to due process review. *Id.*

The Fourth Circuit also has extended the "entitlement" test to land use claims. In *Gardner v.*

City of Baltimore Mayor and City Council, 969 F.2d 63 (4th Cir. 1992), that court held:

> Under this [*Roth* analysis] approach, whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest.

969 F.2d at 68.

So, too, the Eleventh Circuit. *James*, 33 F.3d at 1306 ("In order for an individual to have a protected property interest, he or she . . . must, instead, have a legitimate claim of entitlement to it.'") (quoting *Roth*, 408 U.S. at 577); *see also Spence v. Zimmerman*, 873 F.2d 256, 261 n.6 (11th Cir. 1989) ("Because we conclude that the Spences had no protectible [*sic*] property interest in the TCO [temporary certificate of occupancy] and were never deprived of the building permit, we do not address the Spences' claim that they have been deprived of a property interest without procedural due process."); *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (a landowner must show "a state-created property right in the development project" before a due process analysis applies).

The Eighth Circuit likewise follows the *Roth* entitlement approach. In *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997), the Court described a protected property interest as

> [a] claim to entitlement [which] arises, for these purposes, when a statute or regulation places substantial limits on the government's exercise of its licensing discretion. Thus, the holder of a land use permit has a property interest if a state law or regulation limits the issuing authority's discretion to restrict or revoke the permit by requiring that the permit issue upon compliance with terms and conditions prescribed by statute or ordinance.

126 F.3d at 1070.

3. The Seventh, Ninth, and Third Circuits Consider Landownership a Sufficient Property Interest, in Conflict with the "Entitlement" Circuits

The Seventh, Ninth, and Third Circuits have rejected the "entitlement" approach in favor of one considering a land use applicant's fee simple rights sufficient to trigger procedural protections.

Writing for the Seventh Circuit, in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), Judge Easterbrook explained:

> River Park . . . surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process . . . . An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the

> property interest but are legal restrictions on the use of property.

23 F.3d at 165-66 (citations omitted); *see also Polenz v. Parrott*, 883 F.2d 551, 556-57 (7th Cir. 1989) ("The attribute of ownership at issue in the zoning cases is the right of use—one of the bundle of rights attendant to ownership under the laws of property in all states . . . . [Thus a due process claim will lie] based on the right to exclusive use and enjoyment.").

Like the Seventh Circuit, the Ninth Circuit recognizes that landownership warrants due process for land use decisions, in conflict with the entitlement circuits. *Harris*, 904 F.2d at 503 (" 'The right of [an owner] to devote [his] land to any legitimate use is properly within the protection of the Constitution.' ") (quoting *Washington ex rel. Seattle Title and Trust v. Roberge*, 278 U.S. 116, 121 (1928)); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 949 (9th Cir. 2004) (Landowners have "a constitutionally 'protected property interest'" in their "right 'to devote [their] land to any legitimate use' ") (quoting *Harris*, 904 F. 2d at 497). Last year, the Ninth Circuit reaffirmed its precedent in this area, emphasizing that "[w]e see no difficulty in recognizing the alleged deprivation of rights in real property as a proper subject" of due process review. *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007).

The Third Circuit takes the same approach as the Ninth and Seventh Circuits. In *DeBlasio v. Zoning Bd. of Adjustment for Twp. of West Amwell*, 53 F.3d 592 (3d Cir.), *cert. denied*, 516 U.S. 937 (1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003),

the town argued that a landowner had no property interest in a favorable zoning decision and, therefore, due process rights were not implicated. The Third Circuit disagreed, holding: "[O]wnership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership." *DeBlasio*, 53 F.3d at 600-01 (citations and footnotes omitted).

The decision below is in abject conflict with the decisions of the Seventh, Ninth, and Third Circuits on whether *Roth's* "new property" entitlement requirement precludes due process protection for land use permit applicants.

The Court should grant the Petition to resolve the conflicts.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: August, 2008.

Respectfully submitted,

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Appendix A–1

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 08a0110p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES and CATHERINE BRAUN, husband and wife, EDWARD and MURIEL PARDON, husband and wife,

Plaintiffs-Appellants, No. 07-1370

v.

ANN ARBOR CHARTER TOWNSHIP,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 05-71330-Lawrence P. Zatkoff, District Judge.

Argued: February 1, 2008

Decided and Filed: March 13, 2008

Before: MERRITT, GILMAN, and COOK, Circuit Judges.

COUNSEL

ARGUED: J. David Breemer, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Appellants. Thomas R. Meagher, FOSTER, SWIFT, COLLINS & SMITH, Lansing, Michigan, for Appellee. ON BRIEF: J. David Breemer, PACIFIC LEGAL FOUNDATION, Sacramento, California, Joseph W. Phillips, CONLIN, McKENNEY & PHILBRICK, Ann Arbor, Michigan, for Appellants. Thomas R. Meagher, FOSTER, SWIFT, COLLINS & SMITH, Lansing, Michigan, for Appellee.

OPINION

I.

MERRITT, Circuit Judge. In this Takings Clause and Due Process case, landowners who sought to rezone their farmland for a trailer park and other residential development challenge the district court's order granting the defendant Township's motion for summary judgment. The district court held that the plaintiffs' Takings Clause claim was not ripe for review in the federal courts due to the rule of *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), which requires that a plaintiff first give the state court an opportunity to adjudicate the issue of just compensation before seeking a declaration from a federal court that the state has failed to provide just compensation. According to *Williamson County*, a plaintiff bringing a takings claim must first pursue – and be denied – available remedies in state court. The district court in the present case concluded that the plaintiffs' failure to

do so precludes a federal court from exercising subject matter jurisdiction over the takings claim. The district court also held that the plaintiffs' contention that the defendant's zoning ordinance and appeals process violated various constitutional rights – including procedural due process, substantive due process and equal protection – was "ancillary" to the takings claim and thus similarly unripe for review.

The plaintiffs argue in their appeal that these injuries are unrelated to the Takings Clause claim and must be reviewed as completed injuries. Conflicting case law exists as to whether such claims are, in fact, independent. However, even assuming that the claims are not ancillary to the Takings Clause issue, summary judgment is nevertheless appropriate for the defendant. Consequently, we affirm the grant of summary judgment for the defendants.

II.

Plaintiffs Charles and Catherine Braun own 280.5 acres of property zoned A-1 (Agricultural District) and an additional 5.5 acres zoned R-2 (Single Family Suburban Residential District).[1] Plaintiffs Edward and Muriel Pardon own 77 acres of neighboring property that is zoned as A-1. The two properties (collectively, the "Property") are located along the northern boundary of Ann Arbor city limits in Michigan (the

[1] A-1 zoning limits property uses to (1) specified agricultural activities, (2) public or quasi-public activities, and (3) single family detached lots having a minimum size of 10 acres. R-2 zoning allows up to one home per acre.

home of the University of Michigan), in a township with a population of 5,000.[2]

Both the Brauns and the Pardons had used their land for commercial farming for many years. Due to the declining profitability of farming, a fact supported by expert testimony, the two families contracted to sell the Property to Plaintiff Colt Farms, Inc. ("Colt Farms"), a real-estate developer. On February 27, 2001, the plaintiffs asked the defendant Township to rezone approximately 215 acres of the Property to R-6 (Mobile Home Park Residential District) and the remaining 149 acres to R-3 (Single Family Home Urban Residential District). In support of their application, the plaintiffs included an appraiser's opinion that only high-density residential housing would be economically viable for the Property. On April 2, 2001, the defendant notified the plaintiffs that their Petition for Rezoning would be considered at a public hearing, which commenced before the Planning Commission on May 24, 2001. A second full hearing to consider the application occurred on July 9, 2001. Afterwards, the Planning Commission sent the plaintiffs a request with a list of site-specific information that the commission stated was relevant to its determination, but which was not required by the zoning ordinance. The plaintiffs did not accede to this request, indicating by letter that the request was unauthorized and that they had provided all of the

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[2] The plaintiffs' proposal for re-zoning could ultimately increase the Township's population by over 3,000, to 8,000. See Joint Appendix ("JA") 68-69.

information required by the relevant Zoning Ordinance.[3] The Planning Commission then held a third public hearing on August 6, 2001, at which time it voted to deny the plaintiffs' petition and submitted its recommendation to the Township Board. On September 14, 2001, the Washtenaw County Metropolitan Planning Commission also voted to recommend denial of the plaintiffs' petition for rezoning. Finally, on October 15, 2001, the defendant's Township Board adopted a resolution denying the application for rezoning based on its conclusion that the proposed rezoning would have a significant – and detrimental – impact on the community. *See* Joint Appendix ("JA") 99-105 (describing, *inter alia*, the proposed rezoning's impact on traffic, education, and law enforcement).

After receiving this denial, the plaintiffs asked the defendant about the possibility of receiving a variance from the Zoning Board of Appeals. The Township responded by letter, on October 29, 2001, stating that such an appeal was unavailable because the zoning board does not have the jurisdiction to "change a [zoning classification] for any property, grant a use variance, or hear any other appeal from the Township Board." Br. of Plaintiffs at 10. This advice stemmed from the defendant's interpretation of Section 24.04 of

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[3] Among other issues, the requested information included: the potential impact on water quality, the impact on the Township's traffic, and details about the development's water and sewage plans. *See* JA 92-94. The plaintiffs refused to provide such information, citing the zoning ordinance. At this point, the plaintiffs also indicated that they thought they were being treated differently than other applicants for rezoning. JA 95-97. In its defense, the Township argues that the magnitude of the request mandated a more searching inquiry.

the applicable zoning ordinance, which reads: "The Board of Appeals shall not alter or change the zoning district classification of any property, or make any change to the terms of this ordinance, and shall not take any action that would result in making a legislative change." JA 108-09. The plaintiffs chose not to appeal to the Zoning Board of Appeals.

On February 1, 2002, the plaintiffs brought suit in state court challenging the constitutionality of the A-1 and R-2 district zoning restrictions for violating the Takings Clause, as such restrictions applied to the Property. Declining to reach the merits of the property owners' constitutional claims, the state trial court granted the defendant's motion for summary judgment after finding that the claim was not yet ripe for review. The Michigan Court of Appeals affirmed on the same grounds, noting that the plaintiffs had not sought and been denied a use variance from the Zoning Board of Appeals. *See Braun v. Ann Arbor Twp.*, 683 N.W.2d 755 (Mich. Ct. App. 2004). The Michigan court stated that the finality requirement would be met – and the claims ripe for review in state court – if the plaintiffs were denied "the minimum variance that is necessary to place the land in productive economic use within the zoning classification . . . ." *Id.* at 160. The plaintiffs then unsuccessfully sought leave to appeal to the Michigan Supreme Court. *Braun v. Ann Arbor Twp.*, 698 N.W.2d 400 (Mich. 2005).

On July 21, 2004, the plaintiffs sought a use variance from the Zoning Board of Appeals. The board denied this request after determining that it lacked the appropriate jurisdiction. Instead of returning to state court for a ruling on the merits, the plaintiffs filed suit in federal court asserting the following claims:

(1) deprivation of procedural due process; (2) deprivation of substantive due process; (3) violation of their equal protection rights; (4) violation of the Takings Clause; and (5) a violation of 42 U.S.C. § 1983. The defendant then filed a motion for summary judgment in opposition to the plaintiffs' claims.

The district court granted the defendant's motion, structuring its holding around two issues. First, as to the Takings Clause Claim, it held that the plaintiffs had not fully satisfied the Supreme Court's *Williamson County* rule because they had not sought or been denied "just compensation" in state court. *Braun v. Ann Arbor Township*, No. 05-71330, 2007 U.S. Dist. LEXIS 7908, at * 14 (E.D. Mich. Feb. 5, 2007) ("The Michigan Court of Appeals did not address the *takings clause* or the right to compensation.") (emphasis in original). The court rejected the plaintiffs' attempt to characterize their case as falling under *DLX v. Kentucky*, 381 F.3d 511 (6th Cir. 2004), where we held that a takings claim was ripe for review despite the fact that the state courts had not reached the merits because the state's procedural rules foreclosed any possibility of a remedy. *Braun*, 2007 U.S. Dist. LEXIS 7908 at *17-18 (citing *DLX*, 381 F. 3d at 519). Second, the district court held that the plaintiffs' related constitutional claims were similarly unripe for review because they were all "ancillary" to the takings clause claim. *Id.* at *21. Consequently, it granted the defendant's motion for summary judgment with respect to all of the plaintiffs' claims.

In this appeal, the plaintiffs make two basic arguments. First, they urge us to reconsider the viability of the *Williamson County* rule – which, of course, we may not do so long as it has not been

overruled by the Supreme Court – or, as in *DLX*, to find that the rule does not apply to their case. And second, they contend that the district court's conclusion that the related constitutional claims were ancillary was incorrect as a matter of law. According to the plaintiffs, each constitutional injury is a concrete and completed injury, independent of the takings claim.

III.

This Court reviews *de novo* a district court's grant of summary judgment for a party. *Nat'l Solid Wastes Mgm't Ass'n v. Daviess County*, 434 F.3d 898, 902 (6th Cir. 2006). In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court held that the Takings Clause does not prohibit the government from taking private property, but only prohibits the government from taking private property "without just compensation." 473 U.S. at 194 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 297 n.40 (1981)) (emphasis added). A takings claim is therefore not ripe for review unless a property owner is denied just compensation. 473 U.S. at 194 ("Because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied."); *Waste Mgmt. v. Metropolitan Gov't*, 130 F.3d 731, 739 (6th Cir. 1997). Accordingly, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Coles v. Granville*, 448 F.3d 853, 861 (6th Cir. 2006) (quoting *Williamson*, 473 U.S. at 195). Thus, in order for a plaintiff to bring a takings claim in federal court, he or she must first pursue available

remedies in state court. Two issues inform this analysis: first, whether the initial decision-maker, *i.e.* administrative agency, has arrived at a "definitive position on the issue that inflicts an actual, concrete injury" (the finality requirement); and second, whether the state has denied just compensation based on that injury (the remedies requirement). *Williamson*, 473 U.S. at 193, 195. Although the defendant argues that the plaintiffs have not satisfied the finality prong, we pretermit this question and instead focus on the second prong, which is dispositive on the issue of federal subject-matter jurisdiction.[4]

The parties agree that Michigan provides an adequate "just compensation" procedure. *See, e.g., Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991) ("In Michigan, the doctrine of inverse condemnation is long recognized and constitutionally established.") (citing MICH. CONST., art. 10, § 2). And while the plaintiffs began to use that procedure, they never sought a remedy on the merits in state court and were thus not denied just compensation in state court, as required by *Williamson County*. The plaintiffs make

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[4] In its decision, the district court concluded that the plaintiffs had received the requisite final administrative decision after being denied a variance by the Zoning Board of Appeals. *See Braun* 2007 U.S. Dist. LEXIS 7908 at *11 (quoting *Seguin v. Oliveto*, 968 F.2d 584, 587 (6th Cir. 1992) ("[A] zoning determination cannot be deemed final until the plaintiffs have applied for, and been denied, a variance."). The defendant argues that such a conclusion is not compelled because the plaintiffs essentially asked the Zoning Board of Appeals to deny their application instead of asking for a minimal variance or proposing an alternative, less invasive plan upon which a variance might have been granted. As noted, this issue does not require resolution because the plaintiffs fail under the second prong of *Williamson County*.

two arguments for why this rule should not control their situation.

First, they suggest that *Williamson County* – and its requirement that takings claims must first be pursued in state court – is not good law. They note, for example, that Justice Rehnquist, among other jurists, has expressed skepticism that "federal takings claims . . . should be singled out to be confined to state court." *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring). Additionally, they argue that the *Williamson County* rule creates a "res judicata" trap because federal courts must give preclusive effect to a prior state court action addressing the takings claim. See Br. of Plaintiffs at 25-26 ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, one which is unique to the takings context . . .") (quoting *DLX*, 381 F.3d at 521). In this case, however, the res judicata trap is not at issue – only if the plaintiffs had unsuccessfully pursued a remedy in state court, which was possible after being denied the variance, and then been denied review in federal court would this argument have merit.[5] Similarly, the plaintiffs' argument

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[5] As discussed *infra*, the plaintiff in *DLX* had no recourse whatsoever to federal review because of the operation of Kentucky's procedural reviews. Conversely, the Brauns and Pardons could have filed their claim in state court once it had

(continued...)

that a state court ruling might have precluded federal review under the *Rooker-Feldman* doctrine is a hypothetical argument that is not presented by this case. *See Coles*, 448 F.3d at 857 ("Because we find that plaintiffs' case as presented to both the district court and this Court does not implicate *Rooker-Feldman*, we hold that *Rooker-Feldman* is inapplicable to Plaintiffs' allegations on appeal."). The Supreme Court has yet to adopt the plaintiffs' position or to overrule *Williamson County* on other grounds; consequently, we reject the plaintiffs' argument that they are not bound by the requirement to pursue a remedy in state court.

Second, the plaintiffs contend that they have, in fact, satisfied their obligation to pursue just compensation in state court. Specifically, they claim that they sought, and were denied, state compensation, even though the state court never explicitly reached the merits of their claim. In support of this position, they cite *DLX v. Kentucky*, in which we concluded that a plaintiff had satisfied *Williamson County*'s second prong. 381 F.3d at 518-19. In *DLX*, a plaintiff sought compensation from a Kentucky court for an alleged regulatory taking resulting from the state's refusal to grant mining rights over a property. The state trial court dismissed the claim for lack of ripeness (the company never sought administrative review of the initial decision) and the appellate court reversed. The Supreme Court of Kentucky then granted the state's petition for review, and reversed the appellate court, deciding the case on exhaustion grounds rather than ripeness. *See Commonwealth v. DLX, Inc.*, 42 S.W.3d

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[5] (...continued)
ripened. Thus, the *DLX* Court's warning about the res judicata trap does not ring as strongly in this case.

624, 625 (Ky. 2001). The plaintiff corporation then filed its takings claim in federal district court, which dismissed the claim for want of subject-matter jurisdiction and specifically ripeness. We reversed, however, stating that DLX had "sought compensation and none was awarded ... [t]hat the decision was not 'on the merits' in the strictest sense does not mitigate DLX's injury." 381 F.3d at 519.

But the plaintiffs' argument that *DLX* controls the instant case fails to acknowledge or to explain a key procedural aspect of the earlier case. As the district court in the instant case explained, the *DLX* Court itself emphasized that "DLX *has no more remedy to seek in state court*; the time for application of review of the [administrative] decision is long past, and any state-court action it files will be dismissed for want of exhaustion." *Id.* (emphasis added); *Braun*, 2007 U.S. Dist. LEXIS 7908 at *18. Although the Kentucky courts had not reached the merits of the claim, the state's procedural rules operated to deny just compensation, which, according to our colleagues in *DLX*, made the claim eligible for review under *Williamson County*. But in the instant case, in which the state court's decision was grounded in ripeness analysis, the same problem does not exist: after being denied the variance by the Zoning Board of Appeals, the plaintiffs' claim was ripe for review in state court and no procedural bar existed to prevent review. Moreover, application of the *Williamson County* rule would have deprived DLX from any review whatsoever, a problem that does not exist in the instant case. While we are sympathetic to the plaintiffs' frustration regarding their inability to seek review of the merits of their takings claim, it appears that they mistakenly interpreted *DLX* to allow them to bypass the

Williamson County rule when, in fact, the *DLX* decision is not on point. Because the plaintiffs did not fulfill their obligation of seeking just compensation in state court, we do not have jurisdiction to reach the merits of their takings claim.

IV.

The district court dismissed the plaintiffs' four related constitutional claims – procedural and substantive due process, equal protection, and § 1983 – on the grounds that they were "ancillary" to the unripe takings claim. *See Braun* 2007 U.S. Dist. LEXIS 7908 at *21-22 (citing *Fair v. Peters*, 427 F.3d 1035, 1037 (6th Cir. 2005)). According to the district court, resolution of the takings claim was necessary in order to address the attendant process-related issues. In response to countervailing authority cited by the plaintiffs, the district court noted that those cases were not on point because "none of them involved a plaintiff alleging a federal takings claim." *Id.* at *21. Even assuming that the claims were independent injuries, we affirm the grant of summary judgment for the defendants.

(i) Procedural due process claim

The plaintiffs' procedural due process claim – in which they argue that the Township's treatment of their zoning request demonstrated an insufficiently fair decision-making process – is defective for two alternative reasons. *First*, the claim is ancillary to and includes the same facts as the takings claim and should be governed by the takings claim theory requiring exhaustion of state remedies. *Second*, the claim is without any factual basis showing the deprivation of a property right under state law or the

Constitution because the concept of property under state law does not include the right to have the local government rezone agricultural land to allow a trailer park.

When an individual is deprived of a protected property or liberty interest, "procedural due process generally requires that the state provide a person with notice and an opportunity to be heard" before such a deprivation occurs. *Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005). Where a procedural due process claim occurs alongside a takings claim, we have focused on the circumstances of the specific case – and particularly the issue of when the alleged injuries occurred – before deciding whether to apply *Williamson County* to both claims. *See Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992) ("The plaintiffs' procedural due process claim is ancillary to this main issue; they simply assert that they were not given an effective opportunity to defend their fishing rights before they were taken. There was thus no 'instantaneous infliction of a concrete injury.'") (internal citation omitted); *see also Harris v. Riverside Co.*, 904 F.2d 497, 500 (9th Cir. 1990) (holding that "procedural due process claims arising from an alleged taking may be subject to the same ripeness requirements as the taking claim itself depending on the circumstances of the case"). The plaintiffs rely on *Nasierwoski v. Sterling Heights*, 849 F.2d 890 (6th Cir. 1991), for the proposition that their procedural due process claim is distinct from the takings claim. In *Nasierwoski*, a plaintiff landowner challenged the local government's action of rezoning his property without first giving him either notice of the change or a hearing. We held that such a procedural due process claim is "instantly cognizable in

federal court without requiring a final decision on a proposed development from the responsible municipal agency." 949 F.2d at 894. But as the district court in the instant case noted, the plaintiff in *Nasierwoski* alleged that the government had failed to provide a public hearing before rezoning his property, not that there was an unconstitutional "taking" of his property. *Id.* at 893. The injury in *Nasierwoski* was complete the instant he did not receive notice or a hearing. Thus, the plaintiff in *Nasierwoski* was seeking the very opportunity to have a hearing, which undoubtedly occurred in the instant case, and not a declaration that the state action constituted a taking. Here, the thrust of the plaintiffs' due process claim is that the Township's refusal to rezone their property was a taking, one resulting from a policy bias (evidenced by the request for more information) against low-income housing proposals. Importantly, if the plaintiffs were to succeed in their state-court takings claim, no procedural due process injury would likely exist. We previously explained why, in such a situation, the procedural due process claim is subject to *Williamson County*'s exhaustion requirement:

> Until the state courts have ruled on the plaintiffs' inverse condemnation claim, this court cannot determine whether a taking has occurred, and thus cannot address the procedural due process claim with a full understanding of the relevant facts. Furthermore, addressing the plaintiffs' procedural due process claim at this stage of the proceedings would allow future plaintiffs effectively to circumvent the ripeness requirement for takings claims simply by

> attaching a procedural due process claim to their complaint.

Bigelow, 970 F.2d at 160. Likewise, unless there is a taking in the instant case, we are unable to say that the Township's decision resulted from bias potentially constituting a procedural due process violation. Further, a ruling that the plaintiffs' procedural due process claim is ripe would implicate our concern that a party could easily bypass the *Williamson County* rule by attaching an unclear and underdeveloped procedural due process claim to a takings claim. We therefore believe that the district court's conclusion that the procedural due process claim is ancillary to the takings claim is correct.

Even assuming *arguendo* that the claim is not ancillary to the takings claim and that it is ripe for review, we are unable to find any cognizable property right that triggers due process protections. Property rights are created and defined by independent sources such as state law and not by the Constitution. *See Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002). In order to have a property interest in a benefit, a person must have more than a desire for it or unilateral expectation of it; rather, he must have a "legitimate claim of entitlement to it" – in this case, a legitimate claim or an entitlement to a rezoning or variance allowing a trailer park and other residential development. *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 435 (6th Cir. 2005) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). A property owner arguably has a property right where the government rezones an existing property. *See Nasierwoski*, 949 F.2d at 896 (changing the existing zoning classification deprived the plaintiff of a property right);

see also Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 642 (6th Cir. 2001) (finding a property interest where the zoning permit complied with existing zoning regulations and the site plan had already been approved). But in order to establish a property right in a future, rezoned land use, an individual "must point to some policy, law, or mutually explicit understanding that both confers the benefit[] and limits the discretion of the City to rescind the benefit." *R.S.S.W.*, 397 F.3d at 435 (quoting *Med. Corp., Inc. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002)). Here, the plaintiffs are unable to point to any policy, law, or understanding with the defendant that created the rezoning benefit they are seeking to enforce. And in the instant case, the board certainly possessed the discretion to deny the plaintiffs' request; consequently, no cognizable property right exists, which, in turn, means that procedural due process protections are not triggered.

(ii) Substantive due process claim

The plaintiffs argue that the denial of the zoning change violated substantive due process for two reasons. First, they contend that the denial perpetuated a "policy of barring low-income housing"; and second, they claim that the denial was arbitrary and based on mere speculation. Br. of Plaintiffs at 43-44. Citizens have a substantive due process right "not to be subjected to arbitrary or irrational zoning decisions." *Pearson v. Grand Blanc*, 961 F.2d 1211,1217 (6th Cir. 1992) (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977)). "To state a substantive due process claim in the context of zoning regulations, a plaintiff must establish that (1) a

constitutionally protected property or liberty interest exists, and (2) the constitutionally protected interest has been deprived through arbitrary and capricious action." *Tri-Corp Mgmt. Co. v. Praznik*, 33 F. Appx. 742, 747 (6th Cir. 2002) (citing *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992)). We have previously characterized the relationship between substantive due process and takings claims as follows: "Supreme Court authority subsequent to *Williamson County* strongly stresses that substantive due process concepts are not available to provide relief when another provision of the Constitution directly addresses the type of illegal government conduct alleged by the plaintiff." *Warren*, 411 F.3d at 706-07 (citing *Graham v. Connor*, 490 U.S. 386, 394-95 (1989)). A court should "not interfere with local zoning decisions unless the locality's action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare.'" *Warren*, 411 F.3d at 708 (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928)). But where a substantive due process violation exists, no amount of just compensation can authorize the action. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005).

Here, the district court held that the substantive due process claims were "ancillary" to the takings claim. At least insofar as the remedy sought by the plaintiff (money damages) is the same under both the takings clause and the substantive due process clause, our warning in *City of Athens* is apposite and the due process claim is subsumed by the takings claim. But the plaintiffs do seek equitable relief (an injunction) that would normally be available only under a

substantive due process theory. We thus assume *arguendo* that the substantive due process claim is not ancillary to the takings claim.

As discussed *supra*, the plaintiffs do not appear to have a protected property interest in a future, rezoned use of property for a trailer park. However, even assuming *arguendo* that the plaintiffs do have a protected property interest, no genuine issue of material fact exists as to whether the locality's decision was arbitrary and capricious. The plaintiffs clearly fail to meet this standard. In its letter denying the initial application for rezoning, the defendant provided numerous justifications for its determination, including increased costs (due to the need to build additional schools, for example) and public safety concerns such as higher traffic flow. *See* JA 100-05. These stated reasons, which we have no reason to doubt, clearly defeat any argument that the decision had "no rational relationship to any public purpose." *See Warren*, 411 F.3d at 705. Even when viewed in a light most favorable to the plaintiffs, therefore, the facts compel a grant of summary judgment in the defendant's favor. Consequently, we affirm the decision to grant summary judgment for the defendant on the substantive due process claim.

(iii) Equal protection claim

The plaintiffs do not raise a substantial constitutional issue regarding equal protection. The plaintiffs contend that the defendant treated them differently from other individuals who sought zoning changes by requesting additional information regarding the proposed development to supplement the application for rezoning. To state an equal protection claim, a party must claim that the government treated

similarly situated persons differently. *See Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). Again, conflicting case law exists regarding the district court's determination that the equal protection claim was foreclosed as ancillary to the takings claim. *Compare Bigelow*, 970 F.2d at 159-60 (equal protection claim unripe), *with Silver*, 966 F.2d at 1036-37 (adjudicating equal protection claim despite unripe takings claim).

Even assuming that the plaintiffs' claim is not ancillary to their takings claim, the failure to make any concrete allegations with respect to similarly situated persons mandates a grant of summary judgment in the defendant's favor. The Supreme Court has recognized successful equal protection claims brought by a "class of one" where the plaintiff alleges that he or she has been treated differently from similarly situated individuals. *See Willowbrook v. Olech*, 528 U.S. 562 (2000) (finding a valid equal protection claim where the locality required an owner to convey a 30-foot easement, instead of the stated 15 feet, as a condition for connecting the property to the municipal water supply). However, the basis for any equal protection claim is that a locality has treated similarly situated individuals differently. *Silver*, 966 F.2d at 1036. Although the plaintiffs claim that they have been treated differently from other individuals seeking rezoning, they fail to allege any specific examples of *similarly situated* individuals, let alone evidence of situations where the proposed rezoning was similar in scale or impact. As a result, we need not apply the rational basis test because the plaintiffs have failed to demonstrate the existence of any similarly situated landowners. *Cf. Silver*, 966 F.2d at 1036-37 ("In this case . . . we need not even go so far

as to apply the rational basis test because [the plaintiff] has failed to demonstrate that the Board treated him differently from similarly-situated individuals. Although Silver asserts that the Board has issued conditional zoning certificates to other condominium developments, he has presented no evidence that these other developments were similarly situated to his development."); *see also Tri-Corp*, 33 F. Appx. at 746-47 (rejecting the plaintiff's equal protection for failing to make any allegations with respect to similarly situated individuals).

(iv) § 1983 claim

Finally, the plaintiffs contend that the defendant's denial of its application for rezoning, together with the zoning ordinance, violates 42 U.S.C. § 1983 (creating liability for deprivation of rights secured by the "Constitution and laws" of the United States) by effectively excluding persons of low and moderate income from living in town. We have dealt in this opinion with each of the plaintiffs' claims of "deprivation of any rights, privileges, or immunities secured by the Constitution," and the plaintiffs do not make any claim of right under a federal statute creating independent rights. Therefore, the summary judgment entered by the district court on this point is affirmed.

V.

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment for the defendant.

Appendix B–1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES and CATHERINE BRAUN, husband and wife, EDWARD and MURIEL PARDON, husband and wife, and COLT FARMS, INC.,

Plaintiffs,

v.

ANN ARBOR CHARTER TOWNSHIP,

Defendant.
_____/

Case No.: 05-71330
Hon.: Lawrence P. Zatkoff

OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Port Huron, State of Michigan, on February 5, 2007

PRESENT: THE HONORABLE
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on Defendant's Motion for Summary Judgment (Docket #7). Plaintiffs have filed a response, and Defendant has filed a reply brief. The Court finds that the facts and legal

arguments pertinent to Defendant's Motion for Summary Judgment are adequately presented in the parties' papers, and the decisional process will not be aided by oral arguments. Therefore, pursuant to E.D. Mich. Local R. 7.1(e)(2), it is hereby ORDERED that the Motion be resolved on the briefs submitted, without this Court entertaining oral arguments. For the reasons that follow, Defendant's Motion for Summary Judgment is GRANTED and Plaintiffs' cause of action is DISMISSED WITHOUT PREJUDICE.

II. BACKGROUND

A. The Parties and the Underlying Property

Plaintiffs Charles and Catherine Braun own approximately 280.5 acres of property zoned A-1 (Agricultural District) and an additional 5.5 acres zoned R-2 (Single Family Suburban Residential District). Plaintiffs Edward and Muriel Pardon own approximately 77 acres of land immediately south and west of the Braun property, and it is zoned A-1. The Braun and Pardon properties (collectively, the "Property") are located along the northern boundary of Ann Arbor Township, less than a mile from the Ann Arbor city limits and less than one-half mile from the Village of Barton Hills. The A-1 District limits permitted property uses to (1) specified agricultural activities, (2) public or quasi-public activities, and (3) single family detached residences on lots having a minimum size of 10 acres. The R-2 district allows up to one home per acre. The Brauns and Pardons have contracted to sell the Property to Plaintiff Colt Farms, Inc. ("Colt Farms").

The Brauns commercially farmed their property for approximately 75 years. The Pardons also used

their property for commercial farming. In 2005, the Brauns and Pardons ceased farming operations and leased the Property to a third party for the 2005 crop year. The Pardons lost money in 2005, and the Brauns earn an amount barely sufficient to cover their costs. The tenant on the Property requested a reduced rent for 2006, which caused the Brauns and Pardons to further incur losses.

Barbara Dartt, an experienced agricultural economist, has opined that it is not economically feasible to continue agricultural operation of the Property. In addition, appraiser David C. Burgoyne opined that the Property cannot be economically developed for 30 single family lots, the maximum allowed under the existing zoning restrictions.

B. Plaintiffs' Rezoning Application

On February 27, 2001, the Brauns, the Pardons and Colt Farms (collectively, the "Plaintiffs") asked Defendant to rezone approximately 215 acres of the Property to R-6 (Mobile Home Park Residential District) and the remaining 149 acres to R-3 (Single Family Home Urban Residential District). The Petition for Zoning Amendment supplied by Defendant requires specific information be included in the Petition. The Defendant's Zoning Ordinance requires the same information for a rezoning petition. The Petition for Zoning Amendment states: "THE PETITIONER WILL NOT GO BEFORE THE PLANNING COMMISSION UNTIL ALL OF THE AFOREMENTIONED INFORMATION [IS] PROVIDED." Similarly, §25.03(B) of the Defendant's Zoning Ordinance states: "The Planning Commission shall establish a date of a public hearing on the petition after confirming that the petitioner has

provided all information and paid all fees required by this Ordinance."

On April 2, 2001, Defendant notified the Plaintiffs that their Petition for Rezoning would be considered at a public hearing. The public hearing on Plaintiffs' Petition was commenced before the Defendant's Planning Commission ("Planning Commission") on May 24, 2001. A second full hearing to consider Plaintiffs' application was held before the Planning Commission on July 9, 2001. The Planning Commission then sent Plaintiffs a request with a list of a "host of specific information" the Planning Commission still "need[ed] to know." Plaintiffs notified the Defendant that Plaintiffs had submitted all information required by the Defendant's Zoning Ordinance. Plaintiffs indicated that they believed that the Defendant was treating Plaintiffs differently than other applicants. The Planning Commission held a third public hearing on the Plaintiffs' Petition on August 6, 2001, at which time it voted to recommend a denial of Plaintiffs' Petition. On September 14, 2001, the Washtenaw County Metropolitan Planning Commission also voted to recommend denial of Plaintiffs' Petition. On October 15, 2001, the Defendant's Board of Trustees adopted a resolution denying the Plaintiffs' Petition for Rezoning.

Following the Defendant's action, Plaintiffs asked the Defendant whether there was any possibility of a variance from the Zoning Board of Appeals ("ZBA"). In an October 29, 2001, letter, the Defendant responded that the ZBA "does not have jurisdiction to alter or change a Zoning District Classification of any property, grant a use variance, or hear any other appeal from the Township Board." This advice was based on

Defendant's interpretation of Section 24.04 of the Defendant's Zoning Ordinance, which provides: "The Board of Appeals shall not alter or change the zoning district classification of any property, or make any change to the terms of this ordinance, and shall not take any action that would result in making a legislative change."

C. State Court Proceedings and Defendant's Denial of Use Variance

On February 1, 2002, Plaintiffs brought suit in state court challenging the constitutionality of the A-1 and R-2 district zoning restrictions as such restrictions applied to their properties. The issue of Plaintiffs' state law takings claim was briefed in the trial court before the trial court dismissed Plaintiffs' Complaint. Plaintiffs appealed to the Michigan Court of Appeals. On May 20, 2004, the Michigan Court of Appeals dismissed Plaintiffs' case for failure to exhaust administrative procedures. The Michigan Court of Appeals held that Plaintiffs must seek and be denied a use variance from the ZBA before their claims would be ripe for judicial review. *See Braun v. Ann Arbor Twp.*, 262 Mich.App. 154 (2004). The Michigan Court of Appeals did not address the merits of Plaintiffs' state law takings claim or determine whether Plaintiffs were entitled to compensation. Plaintiffs then sought leave to appeal to the Michigan Supreme Court, but leave was denied.

On July 21, 2004, Plaintiffs sought a use variance from the ZBA. The ZBA denied Plaintiffs' request after determining that it lacked jurisdiction to grant such a use variance.

D. Plaintiffs' Instant Cause of Action

In 2005, Plaintiffs filed a Complaint in this Court that asserted the following claims: (1) deprivation of procedural due process; (2) deprivation of substantive due process; (3) violation of the Plaintiffs' equal protection rights; (4) violation of the takings clause of the U.S. Constitution; and (5) a violation of 42 U.S.C. §1983.

III. STANDARD OF REVIEW

Summary judgment is appropriate only if the answers to the interrogatories, depositions, admissions, and pleadings, combined with any affidavits in support show that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law. See FED. R. CIV. P. 56(c). A genuine issue of material fact exists when there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citations omitted). In application of this summary judgment standard, the Court must view all materials supplied, including all pleadings, in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

The moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the

moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. See FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324. The nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for summary judgment. *See Moore v. Phillip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir. 1993).

IV. ANALYSIS

A. Takings Claim

The Court first addresses Plaintiffs' federal takings claim. An inverse condemnation (*i.e.*, a takings) claim is established when the Government takes property through regulation without just compensation. *See* U.S. Const. amend. V; *Agins v. Tiburon*, 447 U.S. 255 (1980). Pursuant to the current and binding law of the U.S. Supreme Court, in order to bring a federal takings claim in federal court, a plaintiff must have (1) a final administrative decision constituting a taking, and (2) attempted to seek compensation through the procedures the State has provided for doing so. *See Williamson County v. Hamilton Bank*, 473 U.S. 172, 186-97 (1985).[6] The parties agree that Michigan provides an adequate "just

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[6] The Court notes Plaintiffs offer for the Court to heed the proposal of then-Chief Justice Rehnquist to revisit *Williamson's* ripeness requirements. *See San Remo Hotel v. San Francisco, Ca.*, 545 U.S. 323, 348-52 (2005) (Rehnquist, C.J., concurring). The Court is bound by existing Supreme Court precedent, however, and Plaintiffs' well-crafted argument will have to wait to be heard another day, by a higher court.

compensation" procedure. *See, e.g., Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir.1991) ("In Michigan, the doctrine of inverse condemnation is long recognized and constitutionally established").

1. Plaintiffs Received a "Final" Administrative Decision

The Supreme Court, Sixth Circuit and Michigan courts have clearly stated that finality is achieved when a landowner seeks and is denied a use variance. The seminal case is *Williamson*, wherein the county planning commission denied a developer's proposed plat, and the developer sued the county under a federal takings claim pursuant to 42 U. S. C. § 1983. The Supreme Court ruled that the developer's takings claim was not ripe because it "failed to seek variances from either the Board[,] the Commission . . . [or the] Board of Zoning Appeals [which] had the power to grant certain variances." *Williamson*, 473 U.S. at 188. The *Williamson* Court further stated that seeking available variances is the final step to ripen a federal takings claim:

> [R]esort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed.

Id. at 193. *See also Sequin v. Qliveto*, 968 F.2d 584, 587 (6th Cir. 1992)("[A] zoning determination cannot be deemed final until the plaintiffs have applied for, and been denied, a variance."); *Paragon Prop. Co. v. Novi*, 452 Mich. 568, 577-80 (1996) (adopting *Williamson's* variance requirement and holding that a

zoning decision was not final only because plaintiff had not made a "request for variance").

In other words, in order to satisfy the first prong of *Williamson*, a plaintiff must have received a "final" administrative decision before initiating a federal takings claim in federal court. Here, Defendant's Board of Trustees denied Plaintiff's rezoning request after three hearings, and the ZBA formally denied Plaintiffs' application for a use variance on October 29, 2001, after the Michigan courts directed Plaintiffs to do so. The Court's review of the record in this case reveals that Defendant affords zoning applicants no other administrative avenues for obtaining relief. Therefore, Plaintiffs have exhausted their avenues for obtaining a use variance. Accordingly, the Court concludes that Defendant has made a final administrative decision with respect to Plaintiffs' Petition to have the Property rezoned.

Defendant's reliance on *MacDonald v. County of Yolo*, 477 U.S. 340 (1986), is misplaced. In *MacDonald*, the Supreme Court stated that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 477 U.S. at 351. This case is distinguishable, however, as Defendant admitted in the state court that Plaintiffs are not required to apply for every conceivable permitted use or zoning classification for the property. In fact, Michigan law forbids such an onerous and unfair burden. *See, e.g., Oceo Land Co. v. Dept. Nat. Res.*, 216 Mich.App. 310, 315 (1996) ("We decline to hold that a trial court deciding a regulatory taking claim must dismiss the claim as not ripe unless the property owner has

actually taken steps to obtain all necessary permits to proceed with alternate uses, even if it has no intention of adopting any of those alternative uses.").

The Court also rejects Defendant's contention that this Court should ignore the Michigan Court of Appeals' order for Plaintiff to make an appeal to the ZBA. Defendant suggests that this Court should direct Plaintiffs back to the Planning Commission to restart the process. This Court believes that such a directive would require Plaintiffs "to persist with [a] protracted application process to meet the final decision requirement [and] would implicate concerns about disjointed, repetitive, and unfair procedures expressed in *MacDonald*, 477 U.S. at 350 n.7." *Del Monte Dunes v. Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990). This is particularly true here, where Plaintiffs actually took the steps to seek a variance from the ZBA (even though such a request was futile according to the ZBA itself) and such variance has already been denied.

2. Plaintiffs' Federal Takings Claim is Not Ripe For Review

Defendant argues that Plaintiffs must go back to state court again because the Michigan Court of Appeals (and therefore the Michigan Supreme Court) did not rule on Plaintiffs' takings claim and deny Plaintiffs' demand for compensation. *Williamson*, 473 U.S. at 195. As noted above, the Michigan Court of Appeals dismissed Plaintiffs' cause of action for failure to exhaust administrative remedies (*i.e.*, it held that Plaintiffs must petition the ZBA for a variance in order to achieve finality sufficient to ripen their constitutional claims in the Michigan courts). *See Braun*, 262 Mich.App. at 160. The Michigan Court of

Appeals did not address the takings clause or the right to compensation.

Plaintiffs argue that their claim is ripe. Plaintiffs that their state law takings claim was briefed in the Washtenaw County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court. As such, Plaintiffs assert that they exhausted their state judicial remedies in going through the Michigan courts. *Relying on Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991) (plaintiffs "***must have attempted*** to obtain compensation through established state procedures") (emphasis added); *Bigelow v. Michigan Dept. of Nat. Resources*, 970 F.2d 154, 158 (6th Cir. 1992) ("plaintiffs have not pursued an inverse condemnation remedy in the Michigan courts . . ."); *Fair v. Peters*, 427 F.3d 1035, 1038 (6th Cir. 2005) ("[plaintiff) ***must*** . . . ***investigate*** the possible state procedures for compensation for her alleged taking in order for her claim to be ripe") (emphasis added).

The Court notes, however, that unlike the instant case, the plaintiffs in *Macene*, *Bigelow* and *Peters* never filed a takings claim (of any nature) in state court before filing their actions in federal court. As such, the language of the courts in those cases is not overly helpful to Plaintiffs' argument, and certainly not binding, in the matter before this Court. It is not clear to this Court that the Sixth Circuit was saying that a plaintiff need only investigate (which does not even require filing an action) the possible state procedures for compensation in order to have a ripe federal takings claim. To the contrary, it would appear that, at a minimum, the earlier filing of a state law takings claim is necessary. *See, e.g., Bigelow*, 970 F.2d at 158 (*quoting Mancene*, 951 F.2d at 704) ("the plaintiffs

have not pursued an inverse condemnation remedy in the Michigan courts, although such a remedy could be recognized in this case. . . . Since [the plaintiff) has not attempted to use Michigan's inverse condemnation procedure . . . his claim of taking without just compensation . . . is not ripe for review").

Plaintiffs argue that the court in *DLX v. Commonwealth of Kentucky*, 381 F.3d 511 (6th Cir. 2004), rejected a state's contention that a plaintiff must return to state court even though the state court had not addressed the merits of the constitutional claims at issue in that case. In *DLX*, the plaintiff was denied a mining permit at several agency levels in Kentucky, including ultimately being denied the permit by the Secretary of the Kentucky Natural Resources and Environmental Protection Cabinet ("Secretary"). Kentucky law allowed a permit applicant to seek judicial review of a Secretary's final Order, and plaintiff immediately filed a state court takings claim, asserting that the denial of a permit constituted a regulatory taking. The trial court dismissed the case for a lack of ripeness, and an appeals court reversed that decision. The Kentucky Supreme Court then decided the case on the basis of failure to exhaust administrative remedies, rather than ripeness. The Kentucky Supreme Court ruled that because plaintiff had not appealed the Secretary's final order before filing a takings claim, the plaintiff could not proceed on its state constitutional takings claim.

In light of the foregoing facts, the *DLX* court ruled:

> But DLX has been denied just compensation in a state suit; it sought compensation and none was awarded. That the decision was not "on the merits" in the strictest sense does not

> mitigate DLX's injury; its property has allegedly been taken through the denial of its permit application, and **an attempt to remedy that injury in the state court has been defeated by a rule of state law. DLX has no more remedy to seek in state court; the time for application of review of the Cabinet's decision is long past, and any state-court action it files will be dismissed for want of exhaustion. DLX has been denied a federal right through the operation of a state procedural rule without analogue in federal law, and its complaint is ripe.**

DLX, 381 F.2d at 519 (emphasis added).

Plaintiffs overlook a critical difference between the *DLX* case and the instant case. Unlike the plaintiffs in *DLX*, who were barred from further action in state court and therefore were precluded from the ability to be compensated under state law, Plaintiffs in this matter are not barred from seeking compensation in state court. Although the state courts did not address Plaintiffs' entitlement to compensation in the past, that remedy is still available to Plaintiffs. As Plaintiffs have recognized, and as the *DLX* court noted, the *Williamson* Court was concerned with ripeness, which the *Williamson* Court defined as "ensuring that an injury has actually occurred." *DLX*, 381 F.3d at 519.

In this case, Plaintiffs have not yet suffered an injury as they have not been denied just compensation in state court. Although the state court dismissed Plaintiffs' initial filing because Plaintiffs had not completed the necessary administrative procedures, there is nothing to preclude Plaintiffs from pursuing

their takings claim in state court now that they have completed the necessary administrative procedures. As such, Plaintiffs are not in a situation where they have "been denied a federal right through the operation of a state procedural rule." *DLX*, 381 F.3d at 519.

Significantly, the Sixth Circuit has revisited this issue since *DLX*. In *Peters*, 427 F.3d at 1037 (quoting *Williamson*, 473 U.S. at 194) (emphasis added), the Sixth Circuit stated:

> [I]f the state has made available some "reasonable, certain and adequate provision for obtaining compensation," then the claim is not ripe until the claimant has attempted to use this "adequate procedure" **and has been rebuffed**.

In this case, Plaintiffs have not been rebuffed in their attempt to obtain compensation. To the contrary, Plaintiffs' attempt to obtain compensation essentially was "adjourned" until the necessary administrative procedures were completed. Upon refiling their case in state court, the issue of obtaining compensation under a state law takings claim can be decided. If the state courts determine that Plaintiffs are not entitled to just compensation (whether on the merits or because a state rule precludes such recovery), Plaintiff's federal takings claim then will be ripe for consideration by this Court. At this time, however, the Court concludes that Plaintiffs have not satisfied its procedural obligations pursuant to the second prong of *Williamson*.

Accordingly, for the reasons set forth above, Defendant's Motion for Summary Judgment is GRANTED with respect to Plaintiffs' federal takings

claim and that claim is therefore DISMISSED WITHOUT PREJUDICE.

B. Plaintiffs' Remaining Claims

Defendant also moves the Court to dismiss the remaining claims filed by Plaintiff (*i.e.*, the procedural and substantive due process claims, an equal protection claim and a § 1983 claim). Plaintiff argues that the Sixth Circuit has recognized that there are cases where the *Williamson* requirements have not been applied in a zoning case. *See, e.g., Pearson v. City of Grand Blanc*, 961 F.2d 1211,1215 (6th Cir. 1992) ("the very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication"); *Nasierwoski v. Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991) ("a procedural due process claim is instantly cognizable in federal court without requiring a final decision on a proposed development from the responsible municipal agency"); *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989) ("if the injury is the infirmity of the process, neither a final judgment nor exhaustion is required"). In reviewing the cases cited by Plaintiffs, however, the Court notes that none of them involved a plaintiff alleging a federal takings claim.

In cases where a federal takings claim is asserted (and relief from such takings is sought), the Sixth Circuit consistently has held that "claims for violations of substantive due process and procedural due process claims ancillary to a takings claim are also subject to [the *Williamson*] ripeness requirement." *Peters*, 427 F.3d at 1037 (citing *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005)). *See also, Bigelow*, 970 F.2d at 160:

> Until the state courts have ruled on the plaintiffs' inverse condemnation claim, this court cannot determine whether a taking has occurred, and thus cannot address the procedural due process claim with a full understanding of the relevant facts. Furthermore, addressing the plaintiffs' procedural due process claim at this stage of the proceedings would allow future plaintiffs effectively to circumvent the ripeness requirement for takings claims simply be attaching a procedural due process claim, to their complaint. . . . the plaintiffs' procedural due process claim is not ripe, and thus cannot be heard by this court.

For the same reasons, Plaintiffs' §1983 claim and equal protection claim must be dismissed as unripe. *See Peters*, 427 F.3d at 1038 (§ 1983 claim); and *Bigelow*, 970 F.2d at 158-59 (equal protection claim).

For the reasons stated above, Defendant's Motion for Summary Judgment is GRANTED with respect to all of the non-takings claims asserted by Plaintiffs. As the basis for granting summary judgment on those claims is that they unripe, all such claims are DISMISSED WITHOUT PREJUDICE.

V. CONCLUSION

Accordingly, and for the reasons above, Defendants' Motion for Summary Judgment is GRANTED. Plaintiffs' cause of action shall be DISMISSED WITHOUT PREJUDICE, and Judgment shall be entered accordingly.

IT IS SO ORDERED.

s/Lawrence P. Zatkoff

LAWRENCE P. ZATKOFF

UNITED STATES DISTRICT JUDGE

Appendix C–1

No. 07-1370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES AND CATHERINE BRAUN, HUSBAND AND WIFE, ET AL.,	)	FILED Jun 30, 2008 LEONARD GREEN, Clerk
Plaintiffs-Appellants,	)	ORDER
v.	)	
ANN ARBOR CHARTER TOWNSHIP,	)	
Defendant-Appellee.	)	

BEFORE: MERRITT, GILMAN, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green

Clerk

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(3)

No. 08-250

Supreme Court, U.S.
FILED
OCT 27 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHARLES and CATHERINE BRAUN, husband and wife, and EDWARD and MURIEL PARDON, husband and wife,

Petitioners

v.

ANN ARBOR CHARTER TOWNSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should the Court reconsider the second requirement for ripeness of federal takings claims under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City* when the Court of Appeals did not decide whether petitioners satisfied the first requirement?

II. Should the Court reconsider *Williamson County*'s state-litigation requirement when petitioners did not pursue their takings claim to judgment in state court and have not been adversely affected by any jurisdictional or preclusion implications?

III. Should the Court review the Sixth Circuit's holding that petitioners' procedural due process claim arose from the same facts and alleged the same injury as their takings claim and was not ripe, particularly when the other Courts of Appeals follow the same rule?

IV. Should the Court grant certiorari to review *dictum* by the Court of Appeals regarding the property interest necessary to trigger due process protection when the issue was neither raised nor briefed by the parties?

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INTRODUCTION

Petitioners challenge the state-litigation requirement for ripeness established in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S 172 (1985). As support, they rely heavily on Chief Justice Rehnquist's suggestion that in "an appropriate case," this Court should reconsider the requirement that plaintiffs asserting a federal takings claim "must first seek compensation in state courts." *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 352 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy and Thomas, JJ., concurring in judgment).

This is not an "appropriate case" for reviewing the first question raised in the petition.

Petitioners do not dispute *Williamson County*'s requirement of "a final decision regarding the application of the regulations to the property at issue." 475 U.S. at 194. For a takings claim to be ripe, a court must "know[] the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo Co.*, 477 U.S. 340, 351 (1986).

The Court of Appeals did not decide whether petitioners "followed reasonable and necessary steps to allow [the township] to exercise [its] full discretion in considering development plans for the property . . ." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001). In the courts below, Respondent Ann Arbor Charter Township argued that there was no final determination.

Rather, petitioners submitted a rezoning petition which could have increased the township's population from 5,000 to 8,000, overwhelming its public safety services, schools, roads, sewers and other infrastructure. During the review process, petitioners refused to supply information requested by the township's planning commission about the proposed development. Lacking the information needed to responsibly exercise its discretion, the township denied the rezoning petition. Later, petitioners applied for a use variance from a zoning board of appeals with no authority to even consider the request. At the public hearing, petitioners asked the board to deny their own application.

The Court of Appeals said it would "pretermit this question and instead focus on the second prong, which is dispositive on the issue of federal subject-matter jurisdiction." App. at A-9. Because the court did not decide whether petitioners met the finality threshold, the arguments for reconsidering the state-litigation requirement are not squarely presented. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 311 (1987) (noting cases in which concerns with finality made consideration of the remedial question premature).

Moreover, petitioners do not challenge *Williamson County*'s second requirement in concrete or meaningful terms. Their assertion that the state-litigation requirement "operates as a jurisdictional trap, rather than [a] ripeness prerequisite" is an abstraction. Petition at 19. Because petitioners elected not to ripen their takings claim in state court as required by *Williamson County*, they have not been affected or

aggrieved by *San Remo*'s enforcement of the Full Faith and Credit Act.

As to the second question presented, petitioners erroneously assert that the Court of Appeals "subsumed" their procedural due process claim "in its taking analysis." *Id.* at 23. Instead, the court concluded that the due process claim was "ancillary to and include[d] the same facts as the takings claim." App. at A-13. Based on "the circumstances of the specific case," the court held that the due process claim was not ripe under *Williamson County*'s considerations. *Id.* at A-14-16.[1] The Sixth Circuit's fact- and issue-specific examination of the relationship between the due process and takings claims is consistent with the approach used by the other Courts of Appeals.

As to the third question presented, the Court of Appeals' discussion of the property interest required to trigger due process protection is *dictum*. *Id.* at A-16-17. Neither party raised or briefed the issue on appeal or in the district court. The court's unprompted *dictum* does not provide an appropriate basis for deciding this issue.

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[1] Petitioners also asserted substantive due process and equal protection claims in the district court and Court of Appeals. Those claims are not raised in their petition.

SUPPLEMENT TO PETITIONERS' STATEMENT OF CASE

As required by Rule 15.2, the township addresses the following misstatements and omissions that bear on the questions presented in the petition.

Petitioners own property along the northern boundary of Ann Arbor Township in Washtenaw County, Michigan. The Brauns own 286 acres; the Pardons own 77 acres. App. at B-2. They petitioned the township to rezone the property from A-1 (agricultural) and R-2 (single family suburban), to R-6 (mobile home park residential) and R-3 (single family urban residential). *Id.* at B-2–3.

Petitioners did not seek rezoning to a "medium density residential classification" as suggested. Petition at 3. To the contrary, they sought a rezoning to allow mobile home park development on 215 acres and high density single family urban residential development on 149 acres. App. at B-3.

Petitioners' statement that they sought rezoning "consistent with the zoning applicable to other adjacent developed properties" is contrary to the record. Petition at 3. The documents filed by petitioners with their rezoning petition establish that surrounding properties are zoned A-1 (agricultural), R-2 (single family suburban), and R-1 (single family rural residential). The last classification requires larger lots than the R-2 zone. The reviews by township and county planning

commissions determined that the requested rezoning would be incompatible with surrounding property zoning and uses.[2]

To support their allegation that the township unjustifiably requested information about their proposed uses, petitioners gloss over the extraordinary nature of their rezoning petition. The requested rezoning would have significant adverse consequences for the community as detailed by the township and county planning commissions[3] and the township board.[4] The Sixth Circuit noted the clearest example: if granted, the rezoning could increase the township's population by 3,000, from 5,000 to 8,000. App. at A-4, n.2. As a result, the township requested additional information about the impact on roads, traffic, sewers, water and public safety services. *Id.* at A-5, n. 3; Sixth Circuit Joint Appendix (J.A.) 92-94. Petitioners chose not to provide it. Instead, they demanded that the planning commission and township board make their decision without any further input. Petition at 7.

Petitioners incorrectly state that "subdivision plans" were requested by the township although "not required for a zoning change." Petition at 8. No such request was

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[2] Defendant Ann Arbor Charter Township's Motion for Summary Judgment, Exhibit 1, p. 2 & 6-7 (Township Planning Commission Resolution) & Exhibit 2, p. 3 (County Planning Commission Staff Report).

[3] *Id.* at Exhibit 1 & Exhibit 2.

[4] Sixth Circuit Joint Appendix (J.A.) 99-105 (Township Board Resolution).

made. Instead, as noted, the information related to wetlands, water and sewers, traffic, public safety and other topics relevant to rezoning. J.A. 92-94. The county staff report explained the importance of the requested information. Although a drawing attached to the rezoning petition showed only 1,000 manufactured homes, the potential development was not limited if the 220 acres were rezoned to R-6. "The petitioner is not tied to a site plan with a straight rezoning to R-6 and could therefore build out the site to its maximum allowable density" resulting in many more manufactured homes.[5]

Petitioners erroneously claim that the township's decision was "premised on speculation" about the impact of their proposed development. Petition at 8. The planning commission's resolution recommending denial set forth specific reasons and detailed findings.[6] The county metropolitan planning commission then reviewed the petition, made independent findings, and similarly recommended denial.[7] The township board followed the township and county planning commissions' recommendations and adopted a resolution denying rezoning. The resolution identified the "significant – and – detrimental impact on the community." App. at A-5 (citing J.A. 99-105).

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[5] Defendant Ann Arbor Charter Township's Motion for Summary Judgment, Exhibit 2, p. 3.

[6] *Id.* at Exhibit 1.

[7] *Id.* at Exhibit 2.

REASONS FOR DENYING THE PETITION

1. The Court of Appeals did not decide whether petitioners satisfied the finality prong of *Williamson County*.

Petitioners do not challenge *Williamson County*'s final determination requirement. Instead, their petition simply asserts that "the Township made clear that there was no available administrative relief" and presumes that finality ripeness has been satisfied. Petition at 3.

However, the Court of Appeals did not decide this contested issue. The township argued there was no "final decision regarding the application of the regulations to the property at issue," *Williamson County*, 473 U.S. at 186, and therefore, petitioners' takings claim was not ripe for review. The court said:

> Although the defendant argues that the plaintiffs have not satisfied the finality prong, we pretermit this question and instead focus on the second prong, which is dispositive on the issue of federal subject-matter jurisdiction. App. at A-9.

Because the Court of Appeals did not determine whether petitioners satisfied the final determination requirement, this case does not squarely present the first question raised in the petition. A finding that petitioners did not pass this threshold would eliminate any need to consider the state-litigation requirement. See *First English*, 482 U.S. at 311 (issues relating to remedy for taking are premature when finality is not established).

Petitioners and amici rely on the concurring opinion in *San Remo*, which stated that it was not "clear" that *Williamson County* "was correct in demanding that, *once a government entity has reached a final decision with respect to a claimant's property*, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (emphasis added). This passage confirms that the appropriate case for reconsidering the state-litigation requirement should be one where the finality requirement is not disputed.

Petitioners did not satisfy *Williamson County*'s first prong. The process began with their petition to rezone 363 acres that were predominantly zoned "A-1, General Agricultural" for many years. They sought rezoning to allow intensive mobile home park and high-density residential zoning.[8] J.A. 75-90. The effect could have increased the township's population from 5,000 to 8,000, and overwhelmed its schools, roads, municipal services and community resources. App. at A-4, n.2 & A-5 (citing J.A. 99-105).

Presented with a community-changing proposal, the township advised petitioners about its concerns and asked for more information. Petitioners refused to

[8] Petitioners incorrectly state that they sought "a medium density residential classification." Petition at 3. Their request included rezoning of 215 acres to R-6 (mobile home park residential district) and 149 acres to R-3 (single family home urban residential district). The appraisal submitted by petitioners in support of their application described the proposed uses as "high-density residential housing." App. at A-4.

provide any further details about the planned development or the potential impact on township roads and traffic, sewage and water services, public safety services and related items. *Id.* at A-5, n. 3 (citing J.A. 92-94).[9] Lacking any information about these considerations, the township denied the rezoning petition. *Id.* (citing J.A. 99-105). Rather than supplying the requested information or proposing less drastic alternatives, petitioners informally asked about the process for seeking a variance from the zoning board of appeals. The township attorney responded by letter, stating that the zoning board of appeals lacked authority to change a zoning district classification or grant a use variance. *Id.*

Petitioners did not pursue any further approaches with the township and instead filed suit in state court. The state court of appeals held that petitioners had not obtained a final decision as required by *Williamson County* and dismissed the claim for lack of ripeness. *Braun v. Ann Arbor Charter Township*, 683 N.W.2d 755 (Mich.Ct.App.2004).

Again choosing not to provide the requested information or submit a more modest proposal,

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[9] The requested information was relevant to the township's consideration of the rezoning petition. See *Bell River Associates v. China Charter Township*, 565 N.W.2d 695 (Mich.Ct.App.1997) (affirming township's denial of rezoning from agricultural to mobile home park and multiple-family uses, noting potential 40% increase of township's population, unavailability of water and sewer service, lack of proximity to schools, hospitals, and community services, and need for additional police and fire services).

petitioners applied for a variance from the zoning board of appeals despite knowing it lacked any authority to grant such a request. Indeed, petitioners went to the meeting and *requested denial* of their own application. J.A. 128. Following the invited denial, petitioners went directly to federal court without any resort to Michigan's inverse condemnation procedures.[10]

As in *MacDonald*, petitioners submitted an "exceedingly grandiose" rezoning request that would increase the township's population by 60% and then refused to furnish any information about the potential impact on traffic, public safety services, water and sewage capacities, and similar land use factors. 477 U.S. at 353, n. 9 ("Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.") By steadfastly rejecting the township's reasonable inquiries, petitioners effectively abandoned their rezoning request.[11] Their next step (after a precipitous and failed detour into state court) was submitting a variance request to a body that could not grant it and asking for its denial.

This sequence presents substantial questions regarding petitioners' satisfaction of the finality

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[10] The Court of Appeals noted, as did the parties, that Michigan has a well-established inverse condemnation remedy. App. at A-9 (citing *Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991).

[11] *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454-55 (9th Cir. 1987), amended, 830 F.2d 968 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988).

requirement. The first ripeness prong requires a final determination by the appropriate agency regarding the permissible uses of property that allows a court to meaningfully decide whether a regulatory taking has occurred. *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989).

The jurisdictional and prudential reasons for finality – which petitioners do not contest – are not satisfied by a community-changing rezoning petition and a sham variance request.[12] Petitioners had several available options. They could have supplied the requested information and allowed the township to evaluate the proposed rezoning's impact before the public hearings. Petitioners' refusal effectively denied the township "an opportunity to exercise its discretion." *Palazzolo*, 533 U.S. at 620. Second, petitioners could have pursued negotiations with the township regarding "less ambitious plans" that were more consistent with the community's character and resources. *MacDonald*, 477 U.S. at 353, n. 9.

There was no evidence that the township would not allow less intensive development. The township sought

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[12] Although numerous cases refer to a property owner's need to request a variance if available, the correct procedures depend on the particular state's law. "The term 'variance' is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought." *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990). See also, *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.) (landowner must have "pursued alternative, less ambitious development plans"), *cert. denied*, 502 U.S. 810 (1991).

detailed information during its initial review. The zoning board of appeals suggested several options, referring to a comparable development proposal for a nearby agriculturally zoned parcel. J.A. 133, 145. Against this background, petitioners have not received "a final and authoritative determination of the *type and intensity* of development legally permitted on the subject property." *MacDonald*, 477 U.S. at 348 (emphasis added). The township's denial of the rezoning petition to convert farmland into high density residential housing – after petitioners refused to provide the information needed to fairly evaluate the request – represents only an initial "[r]ejection of exceedingly grandiose development plans." *Id.* at 353, n. 9.

The lack of any "meaningful application" was decisive in *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990). An unused railroad right-of-way was zoned for residential, commercial and industrial uses. The city rezoned the property to allow only surface parking. The owners opposed the rezoning but did not submit any development proposals or suggest alternatives other than continuing the preexisting zoning. The Ninth Circuit held that "federal courts would be required to guess what possible proposals appellants might have filed with the City, and how the City might have responded to these imaginary applications. It is precisely this type of speculation that the ripeness doctrine is intended to avoid." *Id.* at 504.

Petitioners' persistent refusals resulted in the same speculation. The township was never given the chance to consider the many alternatives between agricultural

uses at one end and high density mobile home and residential developments at the other. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738-739 (1997) (recognizing "high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer"); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990) (landowner "may need to resubmit modified development proposals that satisfy the local government's objections to the development as initially proposed").

This dispositive issue was not decided by the Court of Appeals. As a result, the soundness of the state-litigation requirement is not properly presented for review.

2. *Williamson County*'s state-litigation requirement is well-founded in the text of the Takings Clause.

There is no need to extensively reiterate the arguments regarding *Williamson County*'s state-litigation requirement. Petitioners raise the same objections asserted in prior cases and debated in law review articles. Petition at 2-3. As foundation, the arguments presume that regulatory taking claims are somehow different than other constitutional claims and should be exempt from the standards governing other federal actions. This Court has twice rejected these arguments – when made by the property owner and when made by a municipality.

The state-litigation requirement is based on the plain language of the Takings Clause. ("[N]or shall

property be taken for public use, without just compensation."). Accordingly, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194.

> If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. *Id.* at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.2) [13]

The right guaranteed by the Takings Clause is "the right to recover just compensation." *First English*, 482 U.S. at 314 (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

That textual understanding of the protection afforded by the Takings Clause was followed in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526

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[13] This reading was accepted before *Williamson County. Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297, n. 40 (1981) ("an alleged taking is not unconstitutional unless just compensation is unavailable"). This Court has consistently followed it since. *First English*, 482 U.S. at 315 (The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."); *Suitum*, 520 U.S. at 734 (state-litigation requirement "stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment"); *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32, 235 (2003).

U.S. 687, 718 (1999) ("Simply put, there is no constitutional or tortious injury until the landowner is denied just compensation.").[14] Because state law did not allow compensation for temporary takings, the property owner had a ripe takings claim under § 1983. This Court held that the right to jury trial applied to § 1983 actions. The city sought "an exception . . . for claims alleging violations of the Takings Clause of the Fifth Amendment." *Id.* at 711. After a lengthy examination of the nature of the just compensation remedy, this Court concluded that there was no justification for treating takings claims differently from other constitutional claims raised in § 1983 actions. *Id.* at 718.

A property owner's request for special dispensation was also declined in *San Remo*. This Court found no reason to "create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation." 545 U.S. at 337. More broadly, this Court recognized that "this is not the only area of law in which we have recognized limits to plaintiffs' ability to press their federal claims in federal courts." *Id.* at 347. Requiring a takings plaintiff to pursue state compensation remedies was justified because "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions" and "undoubtedly have more experience than federal courts do in resolving

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[14] See also, *First English*, 482 U.S. at 320, n. 10 ("illegitimate taking" occurs when "the government refuses to pay")

the complex factual, technical and legal questions relating to zoning and land-use regulations." *Id.*[15]

At the core of petitioners' argument is a belief that their constitutional right to just compensation can be protected *only* in federal court. However, the state-litigation requirement does not weaken a property owner's entitlement to just compensation. Rather, it enforces the language of the Takings Clause by holding that a constitutional violation occurs only when a property owner has been denied just compensation. It respects the role of state courts and legislatures in ensuring the availability of adequate remedies. And, it allows a federal remedy when a state fails to meet its constitutional obligation to provide an adequate just compensation remedy. *First English*, 482 U.S. at 314-316.

Petitioners suggest that abandoning the state-litigation requirement would lead to "a simple return to the doctrinally sound pre-*Williamson County* regime." Petition at 23. However, this Court noted that there is "scant precedent" for litigating takings claims in federal court. *San Remo*, 545 U.S. at 347. The state-litigation requirement is entirely consistent with the central role of state law in determining whether regulatory action

[15] State property law provides the guiding principles in taking cases. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (need for reference to "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" to determine if regulatory act results in taking).

results in a taking[16] and the confidence in state courts to enforce constitutional rights.[17]

3. Because petitioners did not ripen their takings claim in state court as required by *Williamson County*, none of their issues or claims have been precluded. As a result, they have not been affected by the "jurisdictional trap."

Petitioners argue that *San Remo*'s enforcement of the Full Faith and Credit Act turns *Williamson County* into "a jurisdictional trap, rather than [a] ripeness prerequisite." Petition at 19. However, since petitioners did not ripen their claims through state court litigation, there is no judgment with preclusive effect. And in turn, there is no way to determine what particular facts, issues or claims might have been precluded. Thus, petitioners have not been placed in or suffered from the "jurisdictional trap" about which they complain.[18]

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[16] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Lucas*, 505 U.S. at 1027-29, 1031. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998). See, Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 114, 211-14 (2004) (discussing primacy of state law in takings law).

[17] *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

[18] Petitioners advance a related argument that a property owner's compliance with *Williamson County*'s state-litigation requirement prevents federal courts from exercising jurisdiction over takings claims due to the *Rooker-Feldman* doctrine. Petition at 19 n. 3. This issue is also not presented because there has not been a state court judgment. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005).

If this Court wants to revisit the state-litigation requirement, the issue would be best presented by a property owner directly and adversely affected by the rule. Petitioners cannot frame the issue in any meaningful or concrete sense. They have not lost a valid federal claim due to a state court's erroneous conclusion that the township's application of its zoning ordinances did not result in a taking. Nor can they show that a state court failed to justly compensate them for the alleged taking of their property.

Instead, petitioners must speculate that a Michigan court might improperly apply the state's "long recognized and constitutionally established" inverse condemnation doctrine and procedures. *Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991). And, petitioners must assume that a Michigan court would fail to properly enforce federal constitutional provisions. Their hypothetical assertions run directly contrary to this Court's "emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its . . . confidence in their ability to do so." *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (citing *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)).

In dramatic but generic terms, petitioners object to the state-litigation requirement as "wreak[ing] havoc on the federal jurisdictional framework." Petition at 17. However, by choosing to bypass state court – a ripeness requirement in place since 1985 – petitioners have defeated their ability to act as an aggrieved representative for that position.

In the same way, petitioners maintain that *Williamson County* "eviscerates the government's ability to remove a federal takings claim." *Id.* at 20. They are even less suitable advocates for this argument. Obviously, petitioners are not a municipality unable to remove a federal takings claim. They are also not property owners who have endured a "Kafkaesque jurisdictional nightmare" as a case is removed and later remanded. *Id.* at 21-22.

Only three years ago, this Court said that "[i]t is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts." *San Remo*, 545 U.S. at 346. If this Court wants to accept Chief Justice Rehnquist's suggestion for reconsideration of that result, the township believes the better course would be to wait for a property owner who suffered actual and specific harm from proceeding in state court.

4. There is no conflict among the Courts of Appeals as to the ripeness analysis for procedural due process claims asserted in the land use context.

The Court of Appeals did not hold that petitioners' procedural due process claim "was subsumed in its taking analysis." Petition at 23. Nor has any circuit held that "takings claims preempt land use procedural due process claims." *Id.* at 26. Instead, the Courts of Appeals consistently employ a pragmatic approach to determine whether the ripeness considerations underlying *Williamson County* should be applied to procedural due process and other constitutional claims raised in the land

use context. When particular constitutional claims depend on the same facts and are closely related to takings claims, courts hold that ripeness principles call for one or both of the requirements established in *Williamson County*. When the other claims are factually separate and result in distinct injuries, courts find the claims are ripe without requiring finality or state court litigation.

Based on their erroneous characterizations of the Sixth Circuit opinion and the decisions in other circuits, petitioners assert that "subsuming procedural due process claims in takings law effectively ends federal jurisdiction over those claims." Petition at 24. They also maintain that the Sixth Circuit's treatment of due process claims conflicts with decisions in the Fifth and Ninth Circuits. *Id.* at 26-29. Neither argument is correct. Neither warrants a grant of certiorari.

In this case, the Court of Appeals noted that "the thrust of the plaintiffs' due process claim is that the Township's refusal to rezone their property was a taking, one resulting from a policy bias (evidenced by the request for more information) against low-income housing proposals." App. at A-15. The court "focused on the circumstances of the specific case – and particularly the issue of when the alleged injuries occurred." The township's alleged policy bias did not result in an "instantaneous infliction of a concrete injury." *Id.* at A-14 (quoting *Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992)) Until a state court determined whether there was a taking, the Court of Appeals "was unable to say that the Township's decision resulted from bias potentially

constituting a procedural due process violation." *Id.* at A-16. Finding that the procedural due process claim "is ancillary to and includes the same facts as the takings claim," the court concluded that applying *Williamson County*'s ripeness requirements was appropriate. *Id.* at A-13.[19]

The ripeness inquiry involves a careful analysis of the nature and context of due process claims. *Murphy v. New Milford Zoning Comm.*, 402 F.3d 342 (2d Cir. 2005) ("The *Williamson County* ripeness test in a fact-sensitive inquiry that may, when circumstances warrant, be applicable to various types of land use challenges."). This approach "stands merely for the sensible proposition that . . . different circumstances may produce different results." *Bigelow*, 970 F.2d at 160.

Moreover, the analysis is entirely consistent with traditional ripeness principles. Ripeness "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18 (1993). The doctrine protects against "judicial interference until a[ ] . . . decision has been formalized and its effects felt in a concrete way by the challenging parties." *National Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). Under these standards, waiting to see if a taking occurred

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[19] Petitioners also asserted substantive due process and equal protection claims in the Court of Appeals. Those claims are not raised in their petition.

before deciding whether the taking resulted from deficient procedures is prudent, if not constitutionally mandated.

This case-by-case evaluation also serves an important purpose. Justiciability would be reduced to a pleading standard if ripeness could be established by simply restating a land use claim in due process terms,. If ripeness was determined without acknowledging the land use context, a property owner could easily evade the prudential considerations protected by *Williamson County*.

Petitioners incorrectly divide the circuits into two categories – one applying *Williamson County* to procedural due process claims and the other refusing to do so. A review of the cases demonstrates that the Courts of Appeals are much more discriminating. Depending on the circumstances, a court may determine that the nature and context of a procedural due process claim calls for application of *Williamson County*'s ripeness principles. In others, a court may conclude that a particular due process claim stands separately and ripens independently from a takings claim. No Court of Appeals mechanically applies or declines to apply *Williamson County* to other constitutional claims raised in a land use dispute.

Petitioners' categories ignore the differing application of the finality and state-litigation requirements. In some cases, courts only require a final determination before a due process claim is ripe. *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88-89 (2d Cir. 2002) (applying finality but not state-litigation requirement). In others,

when the alleged injury caused by deficient procedures is the deprivation of the right to use property, courts require the claim to be ripened through state compensation procedures. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) (procedural due process claim not ripe unless available state procedures were used).[20]

Moreover, petitioners fail to distinguish the rationale from the holding of the cases used to demonstrate the purported circuit conflict. For example, petitioners put the Fifth Circuit into their "independent claim" category, citing *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036 (5th Cir. 1998). However, in that case, the claim was ripe because the property owners "asserted a violation of their procedural due process rights that inflicted an injury separate from the takings claims that was dismissed before trial." *John Corp. v. City of Houston*, 214 F.3d 573, 585 (5th Cir. 2000). The bright-line categorization suggested by petitioners was explicitly rejected by the Fifth Circuit in *Urban Developers LLC v. City of Jackson*, 468 F.3d 281 (5th Cir. 2006). A developer claimed that a city's statements about condemning flood-damaged apartments and its refusal to approve rebuilding plans violated procedural due process. The court analyzed ripeness "not by direct reference to *Williamson County* . . . but rather by reference to principles of ripeness generally." *Id.* at 296. Because the developer had "yet to suffer a deprivation

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[20] See also, *Taylor Investment,. Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1292-95 (3d Cir. 1993) (finality only); *Rocky Mountain Materials & Asphalt, Inc. v. Board of County Commissioners of El Paso County*, 972 F.2d 309, 311 (10th Cir. 1991) (both).

of property," the procedural due process claim was not ripe. *Id.* at 295-96. See also, *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) (applying general ripeness principles consistently with *Williamson County*).

Nor does the Ninth Circuit fall into petitioners' rigid categories. "Procedural due process claims arising from an alleged taking *may be subject* to the same ripeness requirements as the taking claim itself *depending on the circumstances of the case.*" *Harris v. County of Riverside*, 904 F.2d 497, 500-01 (9th Cir. 1990) (emphasis added). In another case cited by petitioners, *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822 (9th Cir. 2003), the plaintiff could not use its property without paying an unauthorized fee. The denial of procedural due process resulted in "actual, concrete injuries which [were] separate from any taking, . . . [had] already occurred and [did] not depend on the finality of the County's determination of the permissible uses of his property." In terms entirely consistent with the flexible approach used in other circuits, *Carpinteria Valley* concluded that "*in certain limited and appropriate circumstances*," other constitutional claims "concerning land use may proceed even when related Fifth Amendment 'as applied' taking claims are not yet ripe for adjudication." *Id.* at 831 (emphasis added).[21]

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[21] The D.C. Circuit cases cited by petitioners also do not support their contention. The ripeness of the procedural due process claim in *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460 (D.C. Cir. 1997) was not contested and *Williamson County* was not mentioned. No procedural due process claim or ripeness issues were presented in *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988).

The remaining Courts of Appeals do not fit into petitioners' other category. None require all procedural due process claims to satisfy *Williamson County* ripeness. Instead, the courts use the same fact-specific analysis to determine if the finality and state-litigation requirements are appropriate to ripen particular due process claims. *Gilbert v. City of Cambridge*, 932 F.2d 51, 66, n. 20 (1st Cir. 1991) ("same basic claim under two different labels"); *Murphy*, 402 F.3d 342, 350 (2d Cir. 2005) (may apply "when circumstances warrant" based on "fact-sensitive inquiry); *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1293-94 (3d Cir. 1993); *Greenfield Mills, Inc. v Macklin*, 361 F.3d 934, 961-62 (7th Cir. 2004) ("based on the same facts as a takings claim"); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) ("claims that rest upon the same facts as a concomitant takings claim"). In the Sixth Circuit, some procedural due process claims are ripe without a final determination or prior state court litigation. *Nasierowski Brothers Investment Co. v. Sterling Heights*, 949 F.2d 890, 893 (6th Cir. 1991) (claim based on "immediately sustained and concretely felt" injury was ripe). Others are not. *Bigelow*, 970 F.2d at 159-60 (ancillary claim was not ripe).

Ultimately, what these cases hold is that "[l]abels do not matter." *River Park, Inc.*, 23 F.3d at 167. A property owner cannot ripen a claim based on the unconstitutional deprivation of property by couching it as a procedural due process violation. The consistent approach used by the Courts of Appeals means that only those claims which are closely related to and raise the same justiciability concerns as takings claims are subject to *Williamson County*'s ripeness requirements.

Nothing in these cases represents an "unprecedented abdication of federal jurisdiction" over procedural due process claims.

5. The Sixth Circuit did not hold that petitioners lacked a sufficient property interest for procedural due process protection. Instead, the court's discussion is *dictum* regarding an issue neither raised nor briefed by the parties.

The third question presented in the petition, *i.e.*, whether petitioners had a cognizable property interest that triggered due process protection, is not properly before the Court for two reasons: (1) the Sixth Circuit's discussion was *dictum*; and (2) the issue was not raised, briefed, or argued by the parties.

The Sixth Circuit appropriately declined to consider the merits of petitioners' takings claim. Having determined that the claim was not ripe because petitioners failed to satisfy *Williamson County*'s state-litigation requirement, the court correctly stated that "[b]ecause the plaintiffs did not fulfill their obligation of seeking just compensation in state court, we do not have jurisdiction to reach the merits of their takings claim." App. at A-13.

The Court of Appeals next affirmed the district court's dismissal of the procedural due process claim, finding it was ancillary to the takings claim and lacked ripeness. *Id.* at A-13–16. Despite this holding, the court commented that "even assuming *arguendo* that the claim . . . is ripe for review; we are unable to find any cognizable property right that triggers due process

protections." *Id.* at A-16. Because the court held that the due process claim was not ripe, the subsequent discussion is *dictum*. Indeed, the court lacked jurisdiction to review the substantive validity of petitioners' claim. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 912 (2003) (vacating lower court decision on merits because claim was not ripe).

Certiorari is granted to "review[] judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297-88 (1956). With rare exceptions, this Court does not consider an issue that the parties have not had an opportunity to fully develop below. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Petitioners erroneously assert that "the decision below *held* that even if the Property Owners' procedural due process claim was ripe, it failed . . ." for lack of a protected property interest. Petition at 29 (emphasis added). The court made no such holding. The petition continues the mischaracterization, stating that "the court rejected the argument that a fee simple title was a sufficient [property] interest." Petition at 30. The court did not "reject the argument" since no argument was made by either party. To the contrary, the court discussed the issue even though it was not raised or decided in the district court and was not raised, briefed, or argued on appeal.[22]

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[22] Even if this Court believes that this issue deserves consideration, this is not an appropriate case. The "thrust" of petitioners' procedural due process claim is that the township's

(Cont'd)

The third question raised in the petition is not properly before this Court.

CONCLUSION

This is not the "appropriate case" for reconsidering *Williamson County*'s state-litigation requirement. The Court of Appeals did not decide whether petitioners passed the finality threshold. Petitioners have not been affected by the asserted "jurisdictional trap."

The Sixth Circuit and the other Courts of Appeals have responsibly applied *Williamson County*'s ripeness considerations to procedural due process and other constitutional claims related to land use decisions. There is no conflict to resolve.

(Cont'd)
rezoning decision resulted from a "policy bias . . . against low-income housing proposals." App. at A-15. This is a frivolous claim. In Michigan, zoning and rezoning property are legislative functions. *Schwartz v. City of Flint*, 395 N.W.2d 678, 682-83 (Mich.1986). By their legislative nature, rezoning decisions reflect municipal policy choices regarding acceptable and desirable land uses. *Kropf v. City of Sterling Heights*, 215 N.W.2d 179, 188 (Mich.1974) ("Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits."). The constitutional protection against arbitrary and irrational zoning decisions derives from substantive due process. Procedural due process does not protect against legislative choices. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676-77 (1976). If the differing circuit views as to the requisite property interest warrant review, then the issue should be framed by a property owner with a more substantial procedural due process claim.

The nature of the property interest necessary to trigger due process protections is not properly presented. The Sixth Circuit's discussion is *dictum* about an issue neither raised nor briefed by either party.

Respondent Ann Arbor Charter Township asks this Court to deny the petition.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 4 - 2008
OFFICE OF THE CLERK

No. 08-250

In the
Supreme Court of the United States

CHARLES and CATHERINE BRAUN, husband and wife, and EDWARD and MURIEL PARDON, husband and wife,

Petitioners,

v.

ANN ARBOR CHARTER TOWNSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 348-50 (2005) (Rehnquist, C.J., concurring), four justices urged the Court to reconsider whether *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 185, 192-94 (1985), was correct in declaring that a landowner must seek compensation in state court to ripen a federal takings claim. The concurring justices correctly noted that this state litigation requirement has rendered the federal jurisdictional regime governing federal takings claims contradictory, unjust, and virtually unintelligible. Petition for Writ of Certiorari (Pet.) at 17-23; *see also Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031 (E.D. Wis. 2008) (discussing *San Remo*, *Williamson County*, and cataloging jurisdictional problems caused by *Williamson County*).

Because the Sixth Circuit squarely applied the controversial state litigation requirement to dismiss the Petitioner-Property Owners' (Property Owners) claims that the Township effected a taking of their property and violated procedural due process, the Property Owners now ask the Court to act on the *San Remo* concurrence. The issue of whether *Williamson County*'s state litigation rule should be overruled is properly presented because, unlike in *San Remo*, 545 U.S. at 352, (1) the question was expressly raised and passed on in the court below; (2) a decision vacating the Sixth Circuit's decision to continue applying *Williamson County*'s state litigation requirement would revive the Property Owners' takings claim; and (3) there has been no state court litigation on the merits of the Property Owners' claims, so there are no preclusion barriers.

In its Opposition to the Petition (Opp.), the Township points to nothing that diminishes the appropriateness of this case as a vehicle for reconsidering the state litigation requirement. The Township does not dispute that the lower court's application of the rule disposed of the Property Owners' takings claims. It does not dispute that the state litigation rule causes tremendous jurisdictional confusion for courts and litigants. Its observation that the Sixth Circuit declined to address the Township's "final decision" ripeness arguments simply confirms that the state litigation requirement is isolated for this Court's review.

The Township has similarly failed to identify any reason for declining to grant certiorari to decide whether procedural due process claims targeting an injury other than lack of just compensation are to be treated as a takings claim and whether landownership is a constitutionally protected property interest. These issues were briefed and decided below. They are the subject of conflicts among the federal courts of appeals. Pet. at 26-29; 31-37. The decision below directly raises three important issues of federal jurisdiction in the land use context, on which lower courts are in confusion and conflict, and this justifies granting the Petition.

ARGUMENT

I

THE LOWER COURT'S DECISION NOT TO ADDRESS THE TOWNSHIP'S MERITLESS FINAL DECISION ARGUMENTS ISOLATES THE STATE LITIGATION ISSUE FOR THIS COURT'S REVIEW

In *Williamson County*, this Court held that, in addition to litigating in state court, a property owner with a takings claim must normally secure a "final decision" on a land use application before the claim will ripen. 473 U.S. at 188-90. The Court has subsequently stressed that this final decision requirement is "prudential" and not jurisdictional. In this case, the federal district court found that the Property Owners had satisfied the finality requirement due to the Township's denial of their rezoning request and lack of authority to grant a variance. Appendix to the Petition (Pet. App.) at B-9. But, in the decision below, the Sixth Circuit declined to address the final decision issue because it found the "second prong" of *Williamson County*—the state litigation rule—"dispositive of federal subject matter jurisdiction." Pet. App. at A-9.

A. The State Litigation Issue Is Poised for Resolution, While the Undecided Finality Issue Is Properly Resolved on Remand

In its Opposition, the Township argues that "because the Court of Appeals did not determine whether petitioners satisfied the final determination [ripeness] requirement, this case does not squarely

present the first [state litigation rule] question raised in the Petition." Opp. at 7.

Not so. The Property Owners' takings claim was conclusively dismissed by the Sixth Circuit for one reason only: the state litigation requirement. Pet. App. at A-13. If that requirement is not a legitimate jurisdictional barrier, as the four concurring *San Remo* justices suggested, and as the Property Owners argue, then their takings claim remains live. That the claim might be subject to further ripeness defenses if it is revived does not alter the fact that the state litigation rule poses a threshold jurisdictional issue that must be addressed, particularly because the claim was disposed of under that issue. Indeed, the Sixth Circuit's decision to apply the state litigation rule, without addressing the final decision doctrine, isolates the state litigation issue for this Court's review. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 n.8 (1997).

In *Suitum*, this Court reviewed the Ninth Circuit's dismissal of a takings claim on "final decision" ripeness grounds without addressing whether the claim was also subject to the state litigation rule. The reason was that the Ninth Circuit addressed only finality ripeness. *Id.* Here, the situation is reversed—the lower court applied the state litigation rule, but not the final decision doctrine—but the principle of review is the same. That is, since the lower court decided the case on state litigation ripeness alone, that issue is presented, while the unaddressed final decision argument is preserved for remand. *Id.* ("We leave this [other ripeness] matter to the Court of Appeals on remand.").

B. In Discussing Finality, the Township Misstates the Facts and Administrative Procedure

Although it is not relevant to the posture of the state litigation issue, the Property Owners must address some of the Township's (mis)statements about the factual and procedural background of this case.

This dispute does not arise from denial of a development plat. It arises from the denial of manufactured housing and residential zoning classification. If granted, the zoning would have allowed the Property Owners to submit a development plan, but would not vest any particular size of development. *Narrowsview Preservation Ass'n v. City of Tacoma*, 526 P.2d 897, 903 (Wash. 1974) ("rezoning does not involve any physical alteration of the land or irrevocable commitment to allow such a physical alteration."). Under the Township code, issues of development size and impacts are decided in the site planning and subdivision stage that follows zoning. Township Zoning Ordinance § 74-173(c).

Accordingly, it is misleading for the Township to imply that approval of the zoning change would have resulted in a large-scale development. Since the Township *itself* controlled the extent of development in post-zoning planning phases, it could just as plausibly (and probably with more accuracy) say that approval might have resulted in a small development, or a medium-sized one. But, rather than use the subdivision process to control development, the Township chose to deny the requested zoning classification altogether, thereby foreclosing *all* manner of development within the zoning scheme.

In defending the denial, the Township suggests it desired more information, failing to note that this information was not required by its code until the subdivision plat phase. Opp. at A-9. The Township does not deny that the Property Owners supplied all the information required for zoning change. Pet. App. at A-4. Nor does it claim that its zoning denial was by default. The denial was made by formal resolution, with formal findings. Pet. App. at A-4. The Township then informed the Property Owners that there was no administrative appeal mechanism. *Id.* at A-5.

After the state court told the Owners their takings claim would not ripen until they sought a variance and/or got an explicit statement from the Township Zoning Board that it lacked appeal jurisdiction, the Property Owners applied for a variance. Pet. App. at A-6. At a hearing, the Property Owners agreed that the Township code provided the Board no authority to grant a variance, and that a decision to this effect was appropriate. Pet. App. at 128-29. The Board then formally voted to deny the variance. Pet. App. at A-6. This decision categorically prohibited the Property Owners' proposed residential and manufactured housing use. At this point, finality existed, for the Township had exercised its full discretion on the zoning request, resulting in "a conclusive determination . . . whether it would allow [the Property Owners] to develop . . . in the manner [they] proposed."[1]

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[1] The federal courts of appeals, including the Sixth Circuit, are in agreement that denial of a variance, or inability to grant one, establishes finality. *See Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992); *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992); *Brandywine, Inc. v. City of* (continued...)

Williamson County, 473 U.S. at 193-94.[2] To the extent the Township disagrees that this establishes finality, it will have a full opportunity to explain why on remand, should this Court find that the Sixth Circuit improperly dismissed the claims under the state litigation requirement.

II

THIS CASE IS IN THE ONLY POSITION SUITED TO REVIEW OF THE *WILLIAMSON COUNTY* STATE LITIGATION ISSUE

The Township argues that the Court would be in a better position to address the state litigation requirement if the Property Owners first complied with the requirement by securing a state court decision on the merits. Opp. at 18. But the opposite is true. If the

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[1] (...continued)
Richmond, 359 F.3d 830, 834 (6th Cir. 2004); *Herrington v. County of Sonoma*, 857 F.2d 567, 570 n.2 (9th Cir. 1988).

[2] Previously, the Township has relied on *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 (1986), in arguing a lack of final decision. But *McDonald* is inapposite because it did not involve a denial of a zoning classification; the *McDonald* plaintiffs *already had* the residential zoning they needed. *Id.* at 344 n.2. What the *McDonald* plaintiffs were seeking and what they were denied was approval of a residential subdivision plat, calling for a specific and large number of units in particular places. *Id.* at 342. In this context, *McDonald* demanded submission of a second, smaller subdivision plat for ripeness so as to determine whether the desired residential use was precluded despite the permissive zoning. *Id.* at 347. That approach is inapplicable here, in the context of a denial of a zoning classification, because such a denial necessarily precludes *all* subdivision plans, and thus, there is no need to submit smaller development plats to determine that the proposed use is foreclosed.

Property Owners litigated on the merits in state court before raising their federal takings claim, the claim would be barred by res judicata principles, not *Williamson County*, and the state litigation issue would not be presented. Such is the lesson of *San Remo*, in which the takings claimant did litigate in state court, only to be barred from federal court by issue preclusion. When the plaintiffs raised questions about *Williamson County* to this Court, the Court concluded that it could not reach the issue because the claim was precluded. *San Remo Hotel*, 545 U.S. at 348, 352.

The only way the state litigation issue can be properly presented is for a plaintiff to file a takings claim in federal court, without completing any state litigation, and then to suffer dismissal under that rule. This is exactly what happened here. Requiring the takings claimant to fall into the res judicata trap arising from compliance with the state litigation rule, Pet. at 17-20, might trigger renewed questions about that pitfall, but it would not set up the state litigation issue.

III

THERE IS A REAL CONFLICT AMONG THE COURTS ON WHETHER PURPORTEDLY UNRIPE TAKINGS CLAIMS DEFEAT LAND USE PROCEDURAL DUE PROCESS CLAIMS

The Township argues that there is no conflict among the courts on the treatment of land use procedural due process claims. Opp. at 19-20. Its mistake is in misunderstanding the nature of the posited conflict. The conflict is not on whether *all*

procedural due process claims must *always* be treated as takings claims. Rather, the courts are split between those (1) that treat land use due process claims complaining of a procedural injury other than failure to provide compensation; *i.e.*, lack of notice or fair hearing or bias, as a basis for federal relief independent from takings claims, and (2) those that treat such procedural claims as a takings claim subject to *Williamson County*, and therefore refuse to assert jurisdiction. Pet. at 26-29.

It is irrelevant whether the latter class of courts act by directly applying *Williamson County*, out of fear of creating "exceptions" to *Williamson County*, or by deeming the due process claims "ancillary" to an unripe takings claim. Either way, the result is to strip the procedural claim of its own identity so as to subject it to the state litigation ripeness requirement, which in turn bars the claim from federal court under res judicata rules. Pet. at 24-25. It is with respect to this approach, and its preclusive outcome, that the lower courts are in conflict.

Here, the Property Owners' procedural due process claim is not based on failure to provide just compensation, but on procedural irregularities (demand for information not required for a zoning application by the Township code), and biases against lower income housing development,[3] that prevented them from having a meaningful opportunity to be heard. The merits of this claim have never been addressed or passed on, and are not before this Court. This is

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[3] The bias claim is based in part on the allegation that the Township has never approved a manufactured or mobile home zoning application in its history except in one case decades ago where it was forced by a court to do so.

because the Sixth Circuit dismissed the procedural claim for lack of jurisdiction pursuant to *Williamson County*. Pet. App. at A-13-16. In so doing, the lower court (1) sided with circuit courts that, in conflict with others, remove land use procedural due process claims as an independent basis for challenging a property deprivation in federal court, Pet. at 26-29, and (2) ignored this Court's contrary precedent. *Soldal v. Cook County*, 506 U.S. 56, 70 (1992); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50 (1993). The Court should grant the Petition to resolve the conflicts.

IV

THE ISSUE OF WHETHER LAND-OWNERSHIP IS A PROTECTED PROPERTY INTEREST ISSUE WAS RAISED AND PASSED ON, AND SHOULD BE REVIEWED

To avoid review of the Sixth Circuit's decision that the Property Owners lack a protected property interest in their land, the Township argues that the issue was never raised below.[4] Opp. at 26-27. This is both irrelevant and wrong. In the first place, this Court can review an issue passed on by a lower court, regardless of whether it was raised by the parties. *First English*

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[4] The Township also argues that the Sixth Circuit's "no property interest" ruling should not be reviewed because it is "dicta." It fails to recognize that, if this Court grants the Petition and overrules *Williamson County*, as requested, the "no property interest" ruling would be the controlling basis for dismissal of the procedural due process claim. Accordingly, the Property Owners must raise the issue to revive their claim. Since the issue is important and subject to conflicts, it is appropriate for this Court to decide it.

Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 313 n.8 (1987). Second, the Township is not being candid in asserting that the property interest issue was not raised. The issue *was raised* in a petition for rehearing, after the Sixth Circuit addressed it, *sua sponte*, in its opinion. After the Sixth Circuit ordered a response to the rehearing petition, the Township *itself* briefed the property interest issue. Response to Petition for Rehearing at 3-7.

The issue of whether the Property Owners' fee simple landownership is sufficient to implicate procedural due process protections is properly postured for review. Because the lower court's negative answer (1) defeats the Property Owners' procedural due process claim, should the Court overrule *Williamson County*, (2) dramatically affects the ability of landowners to invoke basic due process rights, and (3) is in conflict with other courts, this Court should grant the Petition.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

DATED: November, 2008.

Respectfully submitted,

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preme Court, U.S.
MOTION FILED

SEP 24 2008

William K. Suter,
Clerk

No. 08-250

In The

Supreme Court of the United States

CHARLES and CATHERINE BRAUN, husband and wife, and EDWARD and MURIEL PARDON, husband and wife,

Petitioners,

v.

ANN ARBOR CHARTER TOWNSHIP,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITIONERS

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September 24, 2008

MOTION TO FILE *AMICUS* BRIEF IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37.2(b), the National Association of Home Builders (NAHB) and Franklin P. Kottschade respectfully request leave of this Court to file their brief *amici curiae* in support of Petitioners.[1] Petitioners' counsel filed a blanket consent letter with the Court on September 11, 2008. *Amici* requested consent from Respondent; however, on September 9, 2008, its counsel informed that he could not authorize consent.

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 235,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes constructed each year in the United States. The remaining members are associates

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. One Letter of consent is on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

working in closely related fields within the housing industry, such as mortgage finance and building products and services.

To effectuate its mission, NAHB strives to create an environment in which all Americans have access to the housing of their choice, and builders have freedom to operate as entrepreneurs in an open and competitive market. Toward this end, NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007). It has also participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.[2]

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[2] These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v.*

NAHB's organizational policies have long supported the rights of property owners to have their constitutional claims heard by federal courts. NAHB is disturbed that the federal courts are interpreting this Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (*Williamson*), in a manner that always relegates property owners with legitimate Fifth Amendment takings claims to litigate them only in state court.

Mr. Kottschade is a homebuilder and developer who has attempted to have his takings claims heard in federal court. After months of negotiating with local officials regarding the use of property he owns in the Rochester, Minnesota, the City imposed financially ruinous conditions on his proposed project to develop affordable residential townhomes. He thus

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Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States*, 128 S.Ct. 750 (2008); *Summers v. Earth Island Inst.*, 490 F.3d 687 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); *Winter v. Nat. Res. Def. Council*, 518 F.3d 658 (9th Cir. 2008), *cert. granted*, 128 S. Ct. 2964 (2008) (No. 07-1239); and *Coeur Alaska, Inc. v. S.E. Alaska Cons. Council*, 486 F.3d 638 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).

filed suit in federal court in June 2001, seeking just compensation for a taking of his property under the Fifth Amendment.

However, the federal courts dismissed his case for not being ripe. In 2003, the Court of Appeals for the Eighth Circuit expressed some sympathy for the jurisdictional Catch-22 that *Williamson* causes for takings plaintiffs, but its understanding only went so far and it denied Mr. Kottschade federal court access. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"). Subsequently, this Court denied Mr. Kottschade's petition for certiorari. 540 U.S. 825 (2003). He remains mired in litigation, now in state court, and has yet to receive a decision on the merits from *any* court. To bring attention to the jurisprudential dilemma caused by *Williamson*, Mr. Kottschade has testified before Congress to advocate for legislative reform measures that would confer upon property owners the right to federal court adjudication on Fifth Amendment takings claims. See *Private Property Rights Implementation Act of 2005: Hearing on H.R. 4772 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Franklin P. Kottschade, President, North American Realty).

The proposed brief urges this Court to grant the petition by demonstrating the contradictions that exist between *Williamson* and the Court's other cases regarding federal court jurisdiction over takings

claims.[3] Furthermore, we explain how these conflicting opinions cause a trap for takings plaintiffs and how Mr. Kottschade has been, unfortunately, ensnared.

Accordingly, NAHB respectfully requests that this motion, and the petition, be granted.

September 24, 2008

Respectfully submitted,

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Attorneys for *Amicus Curiae*
National Association of Home Builders

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[3] *E.g.*, *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997).

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SUMMARY OF ARGUMENT

This matter provides another opportunity for the Court to clarify the confusion regarding ripeness for claims under the Fifth Amendment's Takings Clause. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), established the rule that a takings claim does not become ripe for federal court adjudication until the aggrieved property owner pursues inverse condemnation litigation in state court. Four concurring Justices in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), stated that this state-litigation rule "may have been mistaken," and that "[i]t is not clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through state litigation as a prerequisite to ripen a federal takings claim. *Id.* at 348-349 (Rehnquist, C.J., concurring). The *San Remo* concurring Justices believed that *Williamson*'s "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351.

The court of appeals' decision provides the opportunity "revisit" the "real anomalies" created by *Williamson*. The state-litigation rule has been thoroughly aired in the lower federal and state courts. The Court has denied at least seven petitions for certiorari, requesting review of *Williamson*, since its decision in *San Remo*; one pending petition asks a similar question.[1] Postponing review will not

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[1] See *Johnson v. City of Shorewood*, ---N.W.2d----, 2008 WL 434680 (Minn. Ct. App. 2008), *petition for cert. filed*, 77 U.S.L.W. 3075 (U.S. Jul. 28, 2008) (No. 08-127), *Border Bus. Park, Inc. v. City of San Diego*, 49 Cal. Rptr. 3d 259 (Cal. Ct. App. 2007), *cert.*

contribute to resolution of the open questions generated by *Williamson*, inconsistencies within this Court's takings jurisprudence will linger, and conflicting lower court decisions will proliferate. Respectfully, NAHB encourages this Court to grant the petition, reconsider the state-litigation element of *Williamson*'s ripeness doctrine — and dispense with it.

ARGUMENT

I. THE PETITION PROVIDES AN APPROPRIATE VEHICLE TO RE-EVALUATE THE STATE-LITIGATION RULE.

A. *Williamson:* The State-Litigation Rule.

"There are two independent prudential hurdles" to ripen a takings claim. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997). These were established in *Williamson*. First, takings claims are not ripe "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular

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denied, 127 S. Ct. 2280 (2007), *Hillsboro Props. et al. v. City of Rohnert Park et al.*, 41 Cal. Rptr. 3d 441 (Cal. Ct. App. 2006), *cert. denied*, 127 S. Ct. 836 (2006), *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 415 (2007), *Torromeo v. Town of Fremont, N.H.*, 438 F.3d 113 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 257 (2006), *Peters v. Vill. of Clifton*, 498 F.3d 727 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1472 (2008), *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 67 (2007), *City of Marion v. Howard*, 855 N.E. 2d 994 (Ind. 2006), *cert. denied*, 126 S. Ct. 2358 (2006).

land in question." *Williamson*, 473 U.S. at 191. This "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury ...." *Id.* at 193. The finality requirement is not at issue.

Williamson's second ripeness requirement is called into question here: "[If] a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and has been denied just compensation." *Id.* at 195. Concurring in *San Remo*, the late Chief Justice Rehnquist, joined by former Justice O'Connor and Justices Kennedy and Thomas, labeled this requirement the "state-litigation rule." *San Remo*, 545 U.S. at 349, (Rehnquist, C.J., concurring). They described the rule as follows: "Until the claimant had received a final decision of compensation through all available state procedures, such as by an inverse condemnation action ... he 'could not claim a violation of the Just Compensation Clause.'" *Id.* at 349 (citing *Williamson*, 473 U.S. at 195-196).

B. *San Remo:* The State-Litigation Rule Meets Issue Preclusion.

San Remo did not directly address the validity of the state-litigation rule. Rather, the question was whether a takings claimant, in initial state litigation, could reserve a Fifth Amendment claim for subsequent federal adjudication. *San Remo* ruled that such a reservation was inappropriate, resolving a circuit split on that point. *Id.* at 337-338. The Court

further held it was "not free to disregard the full faith and credit statute [28 U.S.C. § 1731] solely to preserve the availability of a federal forum" after initial state litigation mandated by *Williamson*. *Id.* at 347. Issue preclusion was thus held to bar relitigation in federal court after a "state court actually decided an issue of fact or law that was necessary to its judgment" — even if a takings plaintiff "would have preferred not to litigate [first] in state court, but was required to do so by statute or prudential rules." *Id.* at 342.

The *San Remo* concurrence was concerned that the Court's holding regarding issue preclusion "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court ...." *Id.* at 351 (Rehnquist, C.J., concurring).[2] Takings law experts have put the problem this way:

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[2] This is exactly what has transpired. By the mid-1990s, the lower federal courts overwhelmingly invoked the state-litigation rule to avoid adjudicating the merits of Fifth Amendment takings claims. See John Delaney and Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs can Enter the Federal Courthouse*, 31 Urb. Law. 195, 203-205 (Spring 1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). As a preeminent takings scholar testified before Congress, the lower federal courts have exhibited "wholesale abdication of federal jurisdiction" over Fifth Amendment claims and have achieved the "undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits." *Private Prop. Rights Implementation Act of 2005: Hearing on H.R. 1534 Before the Subcomm. on Courts and Intellectual Prop. of the H. Judiciary Comm.*, 105th Cong. 67 (1997) (test. of Prof. Daniel R. Mandelker), *reprinted in* 31 Urb. Law. 234 (Summer 1999).

> [A]s a reward for following the rules and trying to ripen their federal claims in state court as spelled out by *Williamson County*, property owners have the rug yanked out from under them by federal courts saying the door to that courthouse is now closed, because the very act of "ripening" the case actually sounded its death knell.

Michael Berger and Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 687 (Fall 2004).

The preclusive effect of state takings decisions, causing the virtual wholesale relinquishment of jurisdiction by the federal courts over Fifth Amendment takings claims, prompted the *San Remo* concurring Justices to question the state-litigation rule's propriety. They wrote it was not "clear" that *Williamson* "was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 545 U.S. at 349 (Rehnquist, C.J., concurring). The concurrence doubted that "either constitutional or prudential principles" should first require exhaustion of all state compensation procedures before a claimant can vindicate Fifth Amendment rights. *Id.* The concurring Justices acknowledged that *Williamson*'s "state-litigation rule has created some

real anomalies, justifying our revisiting the issue." *Id.* at 351.[3]

C. Unlike *San Remo*, This Case Squarely Questions the Validity of the State-Litigation Rule.

The decision below provides a textbook example of *Williamson*'s effect in barring federal courts from deciding Fifth Amendment takings claims on their merits. While the state-litigation rule was not teed-up for this Court's consideration in *San Remo*, it is directly in play in the case at bench. Here, Petitioners' could no longer operate profitable farms. *Braun v. Ann Harbor Charter Township*, 519 F.3d 564, 567 (6th Cir. 2008). They thus sought approval from the township to use their property for residential housing. *Id.* After the town's officials denied Petitioners' request for rezoning, they filed a takings and due process suit in state court. The trial court and the Michigan Court of Appeals, however, held that the case was not ripe because the Petitioners had not received a final decision. Thereafter, they

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[3] The lower courts would agree. See, *e.g.*, *McNamara v. City of Rittman*, 473 F.3d 633, 640 (6th Cir.) ("It may seem a bit perverse that one takings claim (past violations) be barred by statute of limitations because it was delinquently filed in federal court, and yet a similar claim (continuing violations) be barred by ripeness because it was prematurely filed in federal court"), *cert. denied*, ___ U.S. ___ (2007); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.) (state-litigation rule has created an "anomalous ... gap in Supreme Court jurisprudence"), *cert. denied*, 540 U.S. 825 (2003); *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the [state litigation] ripeness requirement of *Williamson*" with issue and claim preclusion).

obtained their final decision by seeking a variance — which was denied. *Id.* at 567-69.

Still unable to put their property to economically viable use, the landowners brought suit in federal court. Again, they claimed violations of the Fifth and Fourteenth Amendments. However, avoiding the merits, both the district court and court of appeals dismissed the suit for lack of jurisdiction. The courts explained that to ripen their claims, *Williamson* required the Petitioners to first litigate them in state court. *Id.*

In *San Remo,* many *amici* (including NAHB) urged the Court to directly confront *Williamson.* But the invitation was declined because "no court below ha[d] addressed the correctness of *Williamson County,* neither party ha[d] asked us to reconsider it, and resolving the issue could not [have] benefit[ed] petitioners." *Id. San Remo,* 545 U.S. at 352. (Rehnquist, C.J., concurring). The converse is true here. First, the court of appeals *did* consider *Williamson*'s impact, and second, one of the petition's questions plainly asks the Court to reassess the state-litigation rule.

Third, resolving the issue would benefit Petitioners. If the Court reconsiders the state-litigation rule and removes it from the ripeness landscape, Petitioners would receive a federal adjudication on whether the township violated their rights under the Fifth and Fourteenth Amendments of the Constitution.

In short, this is an "appropriate case" to "reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." *San Remo*, 545 U.S. at 352 (Rehnquist, C.J., concurring).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONTRADICTIONS IN THIS COURT'S TAKINGS CASES AND CONFLICTS IN THE LOWER COURTS — ALL ARISING FROM THE STATE-LITIGATION RULE.

The *San Remo* concurring Justices acknowledged that *Williamson*'s "state-litigation rule has created some real anomalies, justifying our revisiting the issue." *Id.* at 351. Those anomalies include contradictions within this Court's own takings decisions, as well as divisions among the circuit courts of appeal.

A. Contradictions in This Court's Takings Cases.

1. Conflict Between *Williamson* and *San Remo*. Tension is especially pronounced between *Williamson* and *San Remo*. The *Williamson* Court stated that exhaustion of state compensation procedures is a first step to ripen federal takings claims: "*[U]ntil* [plaintiff] has utilized [state] procedure[s], its takings claim is *premature*." *Williamson*, 473 U.S. at 197 (emphasis

supplied).[4] Virtually every court of appeals has interpreted this language to mean that a Fifth Amendment takings claim is not ripe — it does not exist — until a property owner has filed suit for inverse condemnation in state court and has been denied compensation.[5] Many commentators also read *Williamson* as providing the opportunity for ultimate federal adjudication following denial of compensation in state court.[6]

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[4] See also *Williamson*, 473 U.S. at 194 ("A second reason the takings claim is *not yet ripe* is that respondent did not seek compensation through the procedures the state has provided for doing so") (emphasis supplied); *id.* at 195 ("the property owner cannot claim a violation of the Just Compensation Clause *until it has used* the [available state] procedure and been denied just compensation") (emphasis supplied).

[5] *E.g.*, *Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatprio, v. Flores Galarza*, 484 F.3d 1, 16-19 (1st Cir. 2007); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Brubaker v. E. Hempfield Twp.*, 234 Fed. Appx. 32, 36-37 (3d Cir. 2007); *Henry v. Jefferson County Planning Comm'n*, 34 Fed. Appx. 92, 96 (4th Cir. 2002); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Peters v. Village of Clifton*, 498 F.3d 727, 731-734 (7th Cir 2007); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Yaklich v. Grand County*, 2008 WL 1936470 at *4-*6 (10th Cir. 2008); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000).

[6] See, *e.g.*, Steven J. Eagle, *Regulatory Takings*, 1062, 2d ed. (2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language ... suggests that the state law is merely preparatory to a federal suit"); Madeline J. Meacham,

The Court's opinion in *San Remo*, however, upends this widespread understanding. It declared that federal takings claims could, in fact, be asserted *during* a state lawsuit:

> The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so" ... does not preclude state courts from hearing *simultaneously* a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

San Remo, 545 U.S. at 346 (citing *Williamson*, 473 U.S. at 194) (emphasis supplied). Thus, while *Williamson* rules that a federal takings claim is not ripe until *after* the state denies compensation, *San Remo* rules that federal claims can be brought *simultaneously* with state claims in state court.

So, which is the rule? Are *Williamson* and *San Remo* reconcilable, or in hopeless conflict? How is it that a Fifth Amendment claim can be brought simultaneously with a state inverse condemnation claim in state court, if that federal claim is not ripe until *after* the state denies compensation? How would the process of bringing simultaneous claims work? Should the state and federal takings claims be

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The Williamson Trap, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

brought in state court sequentially, in that order? Are they part of the same, or separate, lawsuits? What effect does *San Remo*'s simultaneous claim rule have on case law from the lower federal courts, cited *supra* n. 5, which have been virtually unanimous that they lack jurisdiction over Fifth Amendment takings claims until after state litigation is over? Are these opinions now overruled?

The petition should be granted so the Court can clarify the apparent contradictions between *Williamson*'s rule that state litigation is a condition precedent to ripen a federal takings claim, and *San Remo*'s rule that federal and state takings cases can be brought simultaneously in state court.

2. Conflict With This Court's Decision on Removal Jurisdiction in *City of Chicago.* Another anomaly is that the state-litigation rule is apparently irreconcilable with *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156 (1997). There, a plaintiff brought both federal and state takings claims in state court. The city then removed the case to federal court. This Court, without discussing *Williamson*, allowed the removal to stand because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 528-529. Under the federal removal statute,[7] a case can be removed from state to federal court only if it could have been brought in federal court *originally*.

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[7] "[A]ny civil action brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant ... to the district court." 28 U.S.C. § 1441(a) (emphasis supplied.)

Therein, the seeds of more conflict are sown. Under *Williamson*, federal courts do *not* have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. *San Remo* confirms that there is no original federal court jurisdiction over federal takings claims, and counsels that they may be brought simultaneously with state inverse condemnation claims in state court. Yet under *City of Chicago*, federal courts *do* have original jurisdiction over federal takings claims because a municipality has the right to remove them to federal court. The upshot is that federal courts decide federal takings claims only at the whim of municipal defendants who decide to exercise their removal option. The petition should be granted to address the dilemma created by *Williamson*, *San Remo*, and *City of Chicago*, as to whether federal courts do, in fact, possess "original jurisdiction" over Fifth Amendment takings claims.

3. Conflict With This Court's Decision on Seventh Amendment Rights in *Del Monte Dunes*. The state-litigation rule also generates friction with *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). There, this Court held that takings plaintiffs in Section 1983 litigation have a Seventh Amendment right to a jury trial on issues of government liability. That is in stark contrast to the practice in state courts generally, which do not submit takings liability issues to juries. *Id.* at 719. If *Williamson* truly compels state litigation to ripen Fifth Amendment claims, and *San Remo* allows simultaneous litigation of federal and state takings claims in state court, then the Seventh Amendment rights confirmed by *Del Monte*

Dunes are illusory in states that do not provide jury trials on takings liability.

Unlike the Fifth Amendment, which was the first guarantee in the Bill of Rights to apply to the states through the Fourteenth Amendment, see *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897), "[i]t is settled law that the Seventh Amendment does not apply" to "suits decided by state court." *Del Monte Dunes*, 526 U.S. at 719. This Court's attention is needed to ensure that the state-litigation rule does not abrogate Seventh Amendment rights guaranteed by the United States Constitution.

B. Conflict in the Circuit Courts.

1. Circuit Conflict on Claim Preclusion. *San Remo*'s holding is arguably limited to issue preclusion or collateral estoppel.[8] However, the language in the Court's opinion is broad enough to encompass claim preclusion or *res judicata* as well.[9] In any event, there is a circuit conflict as to whether the state-litigation rule triggers *res judicata* to bar subsequent

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[8] See *San Remo*, 545 U.S. at 342 ("The relevant question ... is whether the state court actually decided an issue of fact or law that was necessary to its judgment"); *id.* at 343 ("... we are presently concerned only with issues actually decided by the state court[s] that are dispositive of federal claims raised under § 1983").

[9] *Id.* at 336 (full faith and credit statute "has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue preclusion'"); *id.* at 344 (federal courts may not "simply create exceptions" to full faith and credit statute and "depart[ ] from traditional rules of preclusion") (citations omitted).

federal takings claims. The Second, Sixth, and Ninth Circuits have decided that the *Williamson* requirement to initially litigate in state court does not extinguish Fifth Amendment *claims* subsequently filed in federal court.[10] As the Sixth Circuit observed in rejecting a claim preclusion defense: "[The] interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc.*, 381 F.3d at 521. The Third, Seventh and Tenth Circuits disagree. Those Circuits extend claim preclusion to bar subsequent federal takings claims after mandatory state proceedings have resulted in the denial of compensation under state law.[11]

Significantly, the Ninth Circuit has plainly distinguished between issue and claim preclusion in the context of the state-litigation rule. In *San Remo*, 364 F.3d 1088, 1096 (9th Cir. 2004), it invoked *issue* preclusion to bar relitigation in subsequent federal proceedings, and this Court affirmed, 545 U.S. 323 (2005). But in *Dodd*, 59 F.3d at 869-70, the Ninth Circuit refused to deal the *claim* preclusion card:

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[10] See *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), overruled as to issue preclusion and claim reservation by *San Remo*, 545 U.S. at 342; *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

[11] See *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Peduto v. City of N. Wildwood*, 878 F.2d 725 (3d Cir. 1989).

> [To] hold that a takings plaintiff must first present a Fifth Amendment *claim* to the state court system ... would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result. (Emphasis supplied.)

The circuits thus disagree on the application of claim preclusion following *Williamson* state proceedings, and this Court should intervene.

2. Circuit Conflict on Removal Jurisdiction. As discussed *supra* pp. 11-12, *Int'l College of Surgeons* allows a municipal defendant to remove a takings case to federal court after a plaintiff's initial state filing. However, the lower courts are split on whether they have jurisdiction to decide Fifth Amendment takings claims that have been so removed. The Seventh Circuit, on remand in *Int'l College of Surgeons*, decided it could resolve a removed federal takings claim on the merits, despite the lack of prior state litigation. *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998). In contrast, the Eighth Circuit has held it lacked jurisdiction over a federal takings claim that a municipal defendant removed to federal court, precisely because no original state proceedings ripened the federal claim. The stunning aspect of this decision is that the federal court dismissed for lack of jurisdiction, even though the plaintiff filed initially in state court and was forced into federal court upon the city's removal motion. *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006).

See also *Jones v. City of McMinnville*, 244 Fed. Appx. 755, 2007 WL 1417293 (9th Cir. 2007) (dismissing plaintiffs' federal takings claim without prejudice after City removed the case to federal court).

The Fifth Circuit has similarly whipsawed a takings plaintiff who filed suit originally in state court, only to see a municipal defendant remove the matter to federal court — and then argue for dismissal because *Williamson*'s state-litigation rule went unsatisfied. The Fifth Circuit rewarded the city for its chutzpah by dismissing the case. *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003).

"[C]onsiderations of fairness and justice" lie at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to remove a takings case to federal court, and then seek and receive a dismissal for lack of a prior state ripening suit. The circuits are split on how to handle removed takings cases, and this Court should address the conflict.

3. Circuit Conflict on Application of State-Litigation Rule to Other Constitutional Claims. The lower federal courts also clash on whether the state-litigation rule applies to due process and equal protection claims, in addition to takings claims. As the Petitioners did in this matter, in many constitutional property rights cases, plaintiffs assert some combination of takings, due process, and equal protection violations under 42 U.S.C. § 1983. In the case below, the court recognized that even within the

Sixth Circuit, it is unclear whether due process and equal protection claims must satisfy *Williamson*'s exhaustion requirements. *Braun*, 519 F.3d at 572. While holding that the Brauns' procedural due process claims must satisfy the exhaustion requirements, it assumed the substantive due process claims do not. Furthermore, with respect to equal protection, the court of appeals recognized that "conflicting case law exists" concerning whether *Williamson* applies. *Id.* at 574. In comparison, the Seventh Circuit has held that *Williamson*'s exhaustion requirement applies to both taking and substantive due process claims, yet not equal protection claims. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000); See also *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987) (providing that state inverse condemnation claims must be exhausted for *both* federal takings and due process claims, without opining on equal protection.). Finally, some circuits restrict *Williamson*'s state remedies requirement to takings claims *only*.[12]

The Tenth Circuit has issued two, irreconcilable rulings on this point. It has applied *Williamson*'s

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[12] See, *e.g.*, *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims"; citations omitted). Accord *Sinaloa Lake Owners Ass'n. v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989); *Front Royal and Warren County Indus. Park v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997).

state-litigation rule to takings and procedural due process claims brought under section 1983. See *Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs of El Paso County*, 972 F.2d 309, 311 (10th Cir. 1992). Yet it has also ruled that the state-litigation rule is *not* applicable to any claims sounding in takings, due process, or equal protection, because a plaintiff "need not exhaust his available administrative remedies prior to filing a § 1983 action ...." See *Bateman v. City of W. Bountiful*, 89 F.3d 704, 708 (10th Cir. 1996).

This Court should grant the petition to provide guidance on whether the state-litigation rule encompasses due process and equal protection, as well as takings, claims.

III. *AMICUS* FRANKLIN KOTTSCHADE'S LITIGATION SAGA PERFECTLY ILLUSTRATES THE *WILLIAMSON* TRAP.

Amicus curiae Franklin P. Kottschade, a homebuilder and developer from Rochester, Minnesota, knows all too well the dilemma created by *Williamson*'s ripeness requirements. Respectfully, the Court must understand that the conflicts and confusion created by *Williamson* are not simply the stuff of law review articles, or rarefied judicial debates on jurisdictional ripeness. This issue has real world consequences. It affects families, businesses, and livelihoods. Indeed, for the past seven years, Mr. Kottschade has been trying to overcome the virtually insurmountable hurdles that *Williamson* has erected for property rights claimants.

For nearly a decade, Mr. Kottschade has endeavored to obtain just compensation from the City of Rochester, to redress what he believes was a taking of his property under this Court's precedents. Despite his good faith attempts to comply with this Court's ripeness requirements, he has been relegated to a procedural purgatory with courts at all levels in both the federal and state systems dodging the merits of his claim.

A. The City Imposes Financially Ruinous Conditions on Mr. Kottschade's Development Application, and He Initiates the Federal Suit.

In 2000, Mr. Kottschade sought to develop townhomes on a 16.4 acre parcel of land he acquired in 1992. The City of Rochester granted him a permit approval in 2000, but only if he agreed to myriad, onerous conditions.[13] These exactions had the effect of reducing the number of townhomes he could build from 104 units to 26 units, and increased the development cost for the homes from $22,000 to $90,000 per unit. Mr. Kottschade believed that the City's extortionate demands contravened precedent on unconstitutional exactions. As the Court has

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[13] Among other things, the City has demanded that Mr. Kottschade convey to the City a 50-foot public right-of-way because it might need it at some future point for a road; accept "limited access" to the expanded collector road from his development; grade the property at his expense to make it compatible with one of the City's proposed road reconstruction projects; and pay the cash equivalent of a 1.7-acre parkland dedication requirement.

ruled, development conditions imposed by land-use officials must be based on an "individualized determination" of the impacts caused by the development, and the government must prove both an "essential nexus " and "rough proportionality" – logic and balance – between the development's impacts and what the government exacts from the property owner. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

To achieve administrative finality, Mr. Kottschade petitioned the city for relief from the conditions by seeking a variance, explaining that the conditions would render the proposed development economically unfeasible.[14] In 2001, the city upheld the development conditions and denied Mr. Kottschade's variance.

To vindicate his Fifth Amendment rights, Mr. Kottschade filed an action in the U. S. District Court for the District of Minnesota in 2001. He alleged that the permit exactions violated the takings clause

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[14] To receive a "final decision" from a land-use agency and thus render a takings claim ripe for judicial review, this Court has stated that the aggrieved property owner must pursue any administrative variances from the government's determination. See, *e.g.*, *Williamson*, 473 U.S. at 193 ("Resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 609 (2001) ("A takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law").

under the *Nollan/Dolan* doctrine, and that he was therefore owed just compensation. In 2002, the district court dismissed the federal case, holding that Mr. Kottshade's claims were not ripe because he did not first exhaust litigation in the Minnesota state courts as required by *Williamson*. He then appealed to the Eighth Circuit.

B. The Eighth Circuit Affirms Dismissal of Mr. Kottschade's Federal Takings Case.

In his federal appeal, Mr. Kottschade argued that *Williamson's* state-litigation rule is contrary to *Int'l College of Surgeons'* determination that federal courts have original jurisdiction over federal takings claims. See *supra* at 11-12. He explained that if he is required to seek a state-court remedy first, he will most likely be denied a federal forum altogether under claim and/or issue preclusion. He even asked the Eighth Circuit to hold that an adverse state-court decision would not bar him from filing a subsequent federal takings claim in order to preserve his Fifth Amendment claims.

Sympathetic to a degree, the Eighth Circuit acknowledged that his "suggestion has the virtue of logic and is tempting," but ultimately declined to adopt it. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003). The court held that it was simply too early to determine whether claim or issue preclusion would, in fact, be applied in the future. *Id.* at 1042. Ultimately, the Eighth Circuit ruled that Mr. Kottschade's claim was not ripe under *Williamson*, because he did not pursue initial state court litigation for a compensation remedy. *Id.* This

Court subsequently denied *certiorari* review. 540 U.S. 825 (2003).

C. Mr. Kottschade Remains Stuck in *Williamson*'s Procedural Quagmire — In State Court.

After Mr. Kottschade was dismissed in federal court, he pursued another round of negotiations with the city to try and salvage his project. But Rochester officials were still unwilling to budge on their financially ruinous conditions. Thus, in December 2006, Mr. Kottschade brought an action in state trial court. There, he sought mandamus relief ordering the city to commence a condemnation action to determine the damages arising from the taking. He also sought damages under 42 U.S.C. § 1983, to redress the city's violations of the Fifth and Fourteenth Amendments.

The city moved for summary judgment, arguing that Mr. Kottschade's claims were barred by the applicable six-year statute of limitations under state statute law. The initial development approval (with the unconstitutional exactions) came on July 5, 2000, and Mr. Kottschade brought his state court action on December 22, 2006. Despite clear Supreme Court precedent that pursuit of a variance is necessary before local officials render a final decision for land-use purposes, Rochester has contended that Mr. Kottschade did not need to seek a variance, and that he should have realized that the city's initial approval constituted a final decision. Of course, if Mr. Kottschade had not sought a variance, the city could just as easily have argued that he needed to pursue

that procedure as a necessary element to ripen his claim, and wielded *Williamson* and *Palazzolo* (*supra* n. 14) to argue that no final decision had been rendered.

Despite the fact that the city accepted, processed, and ruled on Mr. Kottschade's variance request, the state trial court granted the city's motion for summary judgment, concluding that the action was time-barred. That decision left him, once again, without a ruling on the constitutionality of the city's onerous permit conditions.

Mr. Kottschade is now in the midst of an appeal to the intermediate appellate level in Minnesota. He argues that the trial court erred when it determined that a variance was not necessary to achieve administrative finality under *Williamson*. Only if he prevails in this intermediate appeal will Mr. Kottschade finally have the opportunity to litigate the merits of his takings claim. If he does not, then his sole remaining options are to seek discretionary review from the Minnesota Supreme Court and this Court.

Mr. Kottschade's saga demonstrates that *Williamson* has the ironic effect of rendering constitutionally-protected property rights a fiction, because they cannot be robustly discussed, debated, and defended in federal court. Constitutional rights are made illusory in this system of municipal gamesmanship, where courts are given license to bob and weave through a jurisdictional maze that allows them to hide from the merits. Respectfully, the petition should be granted so this Court can reconfirm

that it "see[s] no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation ...." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

CONCLUSION

The Court should no longer delay its reconsideration of the state-litigation rule. When *Williamson* was decided in 1985, this Court's modern takings jurisprudence was still in its infancy. Indeed, only after *Williamson*, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), did this Court even decide that monetary compensation was the self-effecting remedy required by the Takings Clause. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined, but the most basic, fundamental jurisdictional question — "Can a federal court ever decide a federal takings claim?" — remains undeciphered. This is a question of overwhelming constitutional importance.

For the foregoing reasons, the petition should be granted.

September 24, 2008.

Respectfully submitted.

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